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# **Insurance & Banking Subcommittee**

**Wednesday, January 15, 2020  
3:30 pm – 5:30 pm  
Sumner Hall (404 HOB)**

**Jose Oliva  
Speaker**

**Byron Donalds  
Chair**

# Committee Meeting Notice

## HOUSE OF REPRESENTATIVES

### Insurance & Banking Subcommittee

**Start Date and Time:** Wednesday, January 15, 2020 03:30 pm  
**End Date and Time:** Wednesday, January 15, 2020 05:30 pm  
**Location:** Sumner Hall (404 HOB)  
**Duration:** 2.00 hrs

**Consideration of the following bill(s) with proposed committee substitute(s):**

PCS for HB 359 -- Insurance

**Consideration of the following bill(s):**

HB 529 Insurance Guaranty Associations by Webb  
HB 813 Protection of Vulnerable Investors by McClure  
HB 6033 Rental Agreements upon Foreclosure by Sirois

Pursuant to rule 7.11, the deadline for amendments to bills on the agenda by non-appointed members shall be 6:00 p.m., Tuesday, January 14, 2020.

By Request of Chair Donalds, all Insurance & Banking Subcommittee members are asked to have amendments to bills on the agenda submitted to staff by 6:00 p.m., Tuesday, January 14, 2020.

**NOTICE FINALIZED on 01/13/2020 4:04PM by Harrell.Lindsey**



# **The Florida House of Representatives**

**Commerce Committee**

**Insurance & Banking Subcommittee**

**Jose R. Oliva**  
Speaker

**Byron Donalds**  
Chair

## **AGENDA**

January 15, 2020  
404 House Office Building  
3:30 PM – 5:30 PM

### **I. Call to Order & Roll Call**

### **II. Consideration of the following bills:**

- A. PCS for HB 359 Insurance
- B. HB 529 Insurance Guaranty Associations by Webb
- C. HB 813 Protection of Vulnerable Investors by McClure
- D. HB 6033 Rental Agreements upon Foreclosure by Sirois

### **III. Adjournment**



**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** PCS for HB 359 Insurance  
**SPONSOR(S):** Insurance & Banking Subcommittee  
**TIED BILLS:** IDEN./SIM. BILLS:

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Insurance & Banking Subcommittee		Lloyd 	Cooper 

**SUMMARY ANALYSIS**

The bill makes the following changes regarding insurance:

- **Motor Vehicle Salvage** – Electronic signatures on motor vehicle odometer disclosures must meet certain security requirements. Current Florida law exceeds the federal standard for these disclosures. The bill conforms the electronic signature security requirements to the federal requirements.
- **Civil Remedies Against Insurers** – Florida law requires a pre-suit notice 60 days prior to suing on a bad faith claim. The notice must go to both the Department of Financial Services (DFS) and the insurer, but no specific insurer address is specified. The bill establishes a specific insurer name and address for notice delivery and specifies that the 60 days starts from the day the insurer receives the notice. The bill also extends the statute of limitation to file a bad faith law suit for 60 days, if the property appraisal process is invoked in the claim.
- **Insurer Trade Secrets** – Insurer trade secrets filed with the Office of Insurance Regulation (OIR) are protected by law (but are not confidential and exempt public records). The bill prohibits DFS and OIR from publishing or disseminating aggregate information that contains protected trade secret information when the trade secret information can be extrapolated from the aggregate information.
- **Extension of Deadlines for Insurance Ratemaking and Form Filings** – Florida law provides certain requirements regarding OIR’s review and approval of property and casualty insurance rate and form filings, but the law is presently silent on the applicable deadline should the closure of the review period fall on a weekend or a holiday. The bill extends the closure of OIR’s review period for property and casualty rate and form filings to the close of the following business day if the deadline falls on a weekend or holiday.
- **Rate Disapprovals Based Upon Hurricane Modeling** – OIR may disapprove property and casualty insurance rate filings based on specified criteria. Current law also establishes criteria for the Florida Commission on Hurricane Loss Projection Methodology (Commission) to consider and approve hurricane loss models and prescribes how approved models affect OIR’s approval of rate filing. The bill establishes that OIR may not disapprove a homeowner’s insurance rate filing solely because the rate filing uses an average to two or more hurricane models approved by the Commission.
- **Time for Filing Property Insurance Claims** – Generally, an insurer must receive a notice of a claim, supplemental claim, or reopened claim within five years of a loss (exceptions: windstorm/hurricane claims – three years; sinkhole loss claims – two years). The bill shortens the time to three years for all claims except sinkhole loss claims, which remains two years.
- **Property Insurance Mediation Notice Requirements** – Insurers are required to provide property insurance policyholders with notice of their right to participate in mediation administered by a DFS mediation program. The bill establishes that, in addition to existing timeframes for providing notice, property insurers have the option to provide a policyholder with notice of its right to mediate at the time the policyholder disputes a claim.
- **Residential Condominium Loss Assessments** – Property insurance policies held by condominium unit owners must include a minimum property losses assessment coverage. The bill clarifies that the amount of loss assessment coverage that can be assessed against a unit owner is based upon the coverage limit in effect one day before the date of the occurrence that resulted in a loss for which the unit owner is assessed.

The bill has no impact on state or local government revenues or expenditures. It has no known positive or negative economic impacts on the private sector.

The bill is effective upon becoming law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Motor Vehicles - Salvage Certificates of Title and Certificates of Destruction**

The owner of a motor vehicle or mobile home that is considered to be salvage<sup>1</sup> is required to forward the title to the motor vehicle or mobile home to the Department of Highway Safety and Motor Vehicles (DHSMV) for processing within 72 hours after the motor vehicle or mobile home becomes salvage.<sup>2</sup> However, an insurance company that pays money as compensation for the total loss of a motor vehicle or mobile home must obtain the certificate of title for the motor vehicle or mobile home, make the required notification to the National Motor Vehicle Title Information System,<sup>3</sup> and, within 72 hours after receiving such certificate of title, forward such title to DHSMV for processing. The certificates of title may be forwarded to DHSMV via electronic means, the United States Postal Service, or other commercial delivery service (e.g., FedEx or UPS). The owner or insurance company may not dispose of a vehicle or mobile home that is a total loss before it obtains from DHSMV a salvage certificate of title or certificate of destruction.

To facilitate the issuance of salvage certificates of title and certificates of destruction when the insurer has been unable to obtain the title from the insured so that it may be surrendered to DHSMV, effective July 1, 2020:

- The insurer may receive a salvage certificate of title or certificate of destruction from DHSMV 30 days after paying the claim, if:
  - There is no electronic lien on the motor vehicle or mobile home; and
  - The insurer has:
    - Obtained a release of all liens;
    - Provided proof of payment of the total loss claim; and
    - Provided an affidavit<sup>4</sup> on letterhead signed by the insurance company or its authorized agent stating the attempts<sup>5</sup> that have been made to obtain the title from the owner or lienholder and further stating that all attempts are to no avail.<sup>6</sup>

The “Electronic Signature Act of 1996”<sup>7</sup> provides that unless otherwise provided by law, an electronic signature<sup>8</sup> may be used to sign a writing and has the same force and effect as a written signature.

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<sup>1</sup> “Salvage” is defined as a motor vehicle or mobile home that is a total loss. S. 319.30(1)(t), F.S. A motor vehicle is a “total loss:”

- When an insurance company pays the vehicle owner to replace the wrecked or damaged vehicle with one of like kind and quality or when an insurance company pays the owner upon the theft of the motor vehicle or mobile home; or
- When an uninsured motor vehicle or mobile home is wrecked or damaged and the cost, at the time of loss, of repairing or rebuilding the vehicle is 80 percent or more of the cost to the owner of replacing the wrecked or damaged motor vehicle or mobile home with one of like kind and quality.

S. 319.30(3)(a), F.S.

<sup>2</sup> S. 319.30(3)(b), F.S.

<sup>3</sup> The National Motor Vehicle Title Information System (NMVTIS) is an electronic system that provides consumers with valuable information about a vehicle’s condition and history. NMVTIS allows consumers to find information on a vehicle’s title, most recent odometer reading, brand history, and, in some cases, historical theft data. [https://www.vehiclehistory.gov/nmvtis\\_consumers.html](https://www.vehiclehistory.gov/nmvtis_consumers.html) (Last visited Dec. 18, 2019).

<sup>4</sup> The affidavit must include a request that the salvage certificate of title or certificate of destruction be issued in the insurance company’s name due to payment of a total loss claim to the owner or lienholder. S. 319.30(3)(b)1.c., F.S.

<sup>5</sup> The attempts to contact the owner may be by written request delivered in person or by first-class mail with a certificate of mailing to the owner’s or lienholder’s last known address. S. 319.30(3)(b)1.c., F.S. If the owner or lienholder is notified of the request for title in person, the insurance company must provide an affidavit attesting to the in-person request for a certificate of title. S. 319.30(3)(b)1.c.2., F.S.

<sup>6</sup> The request to the owner or lienholder for the certificate of title must include a complete description of the motor vehicle or mobile home and the statement that a total loss claim has been paid on the motor vehicle or mobile home. S. 319.30(3)(b)1.c.3., F.S.

<sup>7</sup> Ch. 668, part I, F.S.

<sup>8</sup> Section 668.003(4), F.S., defines “electronic signature” as any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing. A writing is electronically signed if an electronic signature is logically associated with such writing.

In 2019, the Legislature passed CS/CS/CS/HB 301, related to Insurance.<sup>9</sup> Among other things, the bill addressed the use of electronic signatures for automotive title transactions. It authorized an electronic signature consistent with ch. 668, F.S., relating to electronic commerce, to be used to satisfy any signature required related to the issuance of a salvage certificate of title or certificate of destruction when this new process becomes effective. However, it required an electronic signature on an odometer disclosure to meet specific security requirements.

For an odometer disclosure related to a certificate of destruction, the electronic signature must meet or exceed Level 2 requirements for Identity Assurance Level, Authenticator Assurance Level, and Federation Assurance Level, as described in the National Institute of Standards and Technology Special Publication 800-63-3, as of December 1, 2017. For a salvage certificate of title, the electronic signature must meet or exceed Level 3 requirements of this standard. While there are several differences between Level 2 and Level 3 requirements that affect the relative security of the electronic signature, one difference limits the use of electronic signatures when executing electronic signatures for odometer disclosures related to salvage certificates of title. Level 3 requires in person identity proofing, while Level 2 allows remote or in person identity proofing.

The security levels were chosen based on ongoing federal rule development that governs odometer disclosures. The draft federal regulations included the use of Level 2 requirements in certain instances and Level 3 requirements in others. HB 301 mirrored this structure; however, the final federal regulation was published after the 2019 session with an unexpected change. Only Level 2 requirements were implemented. So, the Level 3 requirement of s. 319.30(3)(d), F.S., applicable to odometer disclosures for obtaining salvage certificates of title exceed the federal standard.<sup>10</sup>

#### *Effect of the Bill*

The bill allows electronic signatures on odometer disclosures related to salvage certificates of title to use Level 2 security requirements, consistent with the applicable federal standard. This applies the same security requirements to electronic signatures on odometer disclosures for both certificates of destruction and salvage certificates of title and allows certificate applicants to electronically sign odometer disclosures remotely in both instances, rather than remotely when applying for a certificate of destruction, but in person only for salvage certificates of title.

### **Civil Remedies against Insurers**

#### Pre-Suit Notice and Tolling of the Statute of Limitation Following Issuance of Pre-Suit Notice

In 1982 the Legislature enacted s. 624.155, F.S., which provides that any person may bring a claim for "bad faith" against an insurer for "not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured with due regard for her or his interests,"<sup>11</sup> the same as the common law standard.<sup>12</sup> Section 624.155, F.S., codifies third-party claims for "bad faith," but does not preempt the common law remedy.<sup>13</sup>

Additionally, s. 624.155, F.S., recognizes a claim for bad faith against an insurer not only in the instance of settlement negotiations with a third party, but also for an insured seeking payment from his or her own insurance company. Although Florida courts recognized a bad faith cause of action in the context of liability policies at common law, they did not impose the same obligation in the context of first-party insurance contracts, when the injured party was also the insured under the insurance

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<sup>9</sup> Ch. 2019-108, Laws of Fla.

<sup>10</sup> 84 Fed. Reg. 52664, at 52665 (Oct. 2, 2019).

<sup>11</sup> S. 624.155(1)(b), F.S.

<sup>12</sup> Fla. Standard Jury Instr. 404.4 (Civil).

<sup>13</sup> S. 624.155(8), F.S.

policy.<sup>14</sup> At common law, first-party insurance policies were enforced solely through traditional contract remedies.<sup>15</sup>

In a first-party action under s. 624.155, F.S., there is never a fiduciary relationship between the parties, but an arm's length contractual one based on the insurance contract. A first-party claim against the insurer does not accrue until the conclusion of the underlying litigation for contractual benefits or the insured prevails in the appraisal process and coverage is otherwise established by acceptance or court decision.<sup>16</sup> The underlying action against the insurer must be resolved in favor of the insured, because the insured cannot allege bad faith if it is not shown that the insurer should have paid the claim.

In order to bring a bad faith claim under the statute, a plaintiff must first give the insurer and the Department of Financial Services (DFS) 60 days' written notice of the alleged violation.<sup>17</sup> The 60-day period begins on the date the notice is filed. While the notice is required to be provided to both DFS and the insurer,<sup>18</sup> the statute is silent on what constitutes filing and whether the filing date is the date the notice is received by DFS or the date it was received by the insurer.<sup>19</sup>

The notice must include:

- The statutory provision which the insurer allegedly violated;
- The facts and circumstances giving rise to the violation;
- The name of any individual involved in the violation;
- Reference to specific policy language that is relevant to the violation, unless the person bringing the civil action is a third party claimant; and
- A statement that the notice is given to perfect the right to pursue a civil remedy.<sup>20</sup>

The statute of limitation for the filing of a lawsuit under s. 624.155, F.S., is tolled for 65 days following the issuance of the notice described above. This extends the claimant's right to sue the insurer until after the conclusion of the 60-day period following the notice within which the insurer may respond to the notice by addressing the alleged violation.

In 2019, the Legislature revised s. 624.155, F.S., to prohibit the issuance of the notice when the insurer invokes the appraisal process. However, the appraisal process, which can be invoked for the first time following receipt of the pre-suit notice,<sup>21</sup> is unlikely to be completed within the 60-day cure period or the 65-day tolling of the applicable statute of limitations. If the appraisal process extends beyond the date the statute of limitation expires following the current tolling period, then the right to sue the insurer in civil court is lost.

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Cammarata v. State Farm Florida Ins. Co.*, 152 So. 3d 606 (Fla. 4th DCA 2014).

<sup>17</sup> S. 624.155(3)(a), F.S.

<sup>18</sup> Filing of the notice with the correct insurer has been held to be a condition precedent to maintaining a bad faith suit against the insurer. *Lopez v. GEICO Casualty Co.*, 968 F.Supp. 2d 1202, at 1209 (S.D. Fla. 2013). In *Lopez*, the plaintiff filed the notice with Government Employees Insurance Company, a similarly named sister company instead of the actual insurer, GEICO Casualty Company. Because the statute of limitation had run out following the flawed delivery of the notice, the *Lopez* case was dismissed with prejudice. However, the Second District Court of Appeal

<sup>19</sup> Filing of the notice with DFS has been held to establish the date that starts the 60-day cure period. *Harper v. GEICO Gen. Ins. Co.*, 272 So. 3d 448 (Fla. 2nd DCA 2019). In *Harper*, the plaintiff filed the notice with DFS electronically on Dec. 19, 2013, and mailed the notice to GEICO with it being received by GEICO on Dec. 26, 2013. When GEICO later paid the claim on Feb. 21, 2014, the payment was 65 days from the date DFS received the notice, but 57 days from the date GEICO received the notice. The trial court held that GEICO paid the claim within the 60-day cure period. On appeal, the Second DCA held that the 60-day cure period ran from the date DFS received the notice. The result allowed the plaintiff to pursue a bad faith claim against GEICO for untimely payment of the claim.

<sup>20</sup> S. 624.155(3)(b), F.S.

<sup>21</sup> Invoking the appraisal process along with timely payment, if required, can be used by the insurer to cure its claims handling violations and prevent a bad faith claim. See *Effect of the Bill*, p. 5.

## Property Appraisal Process

Insurance companies often include an appraisal clause in property insurance policies.<sup>22</sup> The appraisal clause provides a procedure to resolve disputes between the policyholder and the insurer concerning the value of a covered loss. The appraisal clause is used only to determine disputed values. An appraisal cannot be used to determine what is covered under an insurance policy. Coverage issues are litigated and determined by the courts.

The appraisal process *generally* works as follows:

- The insurance company and the policyholder each appoint an independent, disinterested appraiser.
- Each appraiser evaluates the loss independently.
- The appraisers negotiate and attempt to reach an agreed amount of the damages.
- If the appraisers agree as to the amount of the claim, the insurer pays the claim.
- If the appraisers cannot agree on the amount, they together choose a mutually acceptable umpire.
- Once the umpire has been chosen, the appraisers each present their loss assessment to the umpire.
- The umpire will subsequently provide a written decision to both appraisers. A decision agreed to by any two of the three will set the amount of the loss.
- The insurance company or the policyholder may challenge the umpire's impartiality and disqualify a proposed umpire based on criteria set forth in statute.<sup>23</sup>

### *Effect of the Bill*

The bill adds an additional tolling period to s. 624.155, F.S. It tolls the statute of limitation for 60 days following the date appraisal is invoked in a residential property insurance claim. In combination with the current 65-day tolling period resulting from the filing of the notice, the statute of limitation could be tolled for up to 125 days to allow the insurer the 60-day cure period and also allow the parties to pursue the appraisal process prior to expiration of the statute of limitation.

The bill also provides that the required pre-suit notice must be sent to the insurer at the insurer's name and address designated by the insurer pursuant to statute for the purposes of receiving legal process service via DFS. Additionally, the bill clarifies that the 60-day cure period runs from the date the insurer receives the notice at the designated name and address, rather than following "filing," which is not defined.

## **Insurer Trade Secrets**

### Public Records

Article I, s. 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. This 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 Florida Constitution.<sup>24</sup> The general law must state with specificity the public necessity justifying the exemption<sup>25</sup> and must be no more broad than necessary to accomplish its purpose.<sup>26</sup>

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<sup>22</sup> *Citizens Property Insurance Corporation v. Mango Hill Condominium Association 12 Inc.*, 54 So. 3d 578 (Fla. 3d DCA 2011) and *Intracoastal Ventures Corp. v. Safeco Ins. Co. of America*, 540 So. 2d 162 (Fla. 3d DCA 1989), contain examples of appraisal clauses.

<sup>23</sup> See s. 627.70151, F.S.

<sup>24</sup> FLA. CONST. art. I, s. 24(c).

<sup>25</sup> This portion of a public record exemption is commonly referred to as a "public necessity statement."

<sup>26</sup> FLA. CONST. art. I, s. 24(c).

Public policy regarding access to government records is addressed further in s. 119.07(1)(a), F.S., which guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act<sup>27</sup> provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no more broad than necessary to meet one of the following purposes:<sup>28</sup>

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect 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.
- Protect trade or business secrets.

The Act also requires the automatic repeal of a public record exemption on October 2nd of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>29</sup> Specified questions must be considered by the Legislature during the review process.<sup>30</sup>

### Trade Secrets

Florida law contains a variety of provisions that make trade secret information exempt or confidential and exempt<sup>31</sup> from public record requirements. Some exemptions only protect trade secrets, while others protect "proprietary business information" and define that term to specifically include trade secrets. Generally, trade secret<sup>32</sup> information received by the Office of Insurance Regulation (OIR) or DFS is not protected as confidential and exempt public record information,<sup>33</sup> but the insurer is given the opportunity to receive notice of a public records request and a period of time to respond so that the insurer can move to protect the trade secret through an action in circuit court, if they so desire.<sup>34</sup> When an insurer submits trade secret information under the Florida Insurance Code<sup>35</sup> or OIR rules, the insurer may file a Notice of Trade Secret and mark and segregate the trade secret information provided to OIR.<sup>36</sup> This protection relates to public records requests from the public that would result in the publication of materials covered under a Notice of Trade Secret. It does not expressly extend to publication of aggregate information such as OIR's Annual Report or other OIR or DFS publications or reports that are not done in response to a public records request.

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<sup>27</sup> S. 119.15, F.S.

<sup>28</sup> S. 119.15(6)(b), F.S.

<sup>29</sup> S. 119.15(3), F.S.

<sup>30</sup> Section 119.15(6)(a), F.S., requires the Legislature to consider the following questions as part of the review process: 1) What specific records or meetings are affected by the exemption? 2) What specific parties does the exemption affect? 3) What is the public purpose of the exemption? 4) Can the information contained in the records or meetings be readily obtained by alternative means? If so, how? 5) Is the record or meeting protected by another exemption? 6) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

<sup>31</sup> There is a difference between records the Legislature designates as exempt from public record 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 statute. *See* Attorney General Opinion 85-62 (August 1, 1985).

<sup>32</sup> "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

S. 626.002(4), F.S.

<sup>33</sup> Trade secret information contained in an insurance administrator's records that is obtained by OIR is confidential and exempt. S. 626.884(2), F.S.,

<sup>34</sup> S. 624.4213(2), F.S.

<sup>35</sup> The Florida Insurance Code is chapters 624-632, 634, 635, 636, 641, 642, 648, and 651, F.S. S. 624.01, F.S.

<sup>36</sup> S. 624.4213(1), F.S.

### *Effect of the Bill*

The bill limits the release of aggregate information by OIR and DFS if protected trade secret information can be extrapolated from the aggregate information that OIR or DFS would otherwise release. This could occur where aggregate information is reported on a line of insurance in which a small number of companies participate such that one or more of the participating companies could back-out their own data from the reported aggregate information and discern the trade secret information of their competitor. The bill does not create a new public records exception, rather, it limits what OIR and DFS may do with public record information that is protected as a trade secret, but is not confidential and exempt public record information.

### **Extension of Deadlines in Insurance Rate and Form Filings**

Florida law provides certain requirements regarding OIR's review and approval of property and casualty insurance rate and form filings, including timeframes within which OIR must review these filings.<sup>37</sup> However, the law is presently silent on the applicable deadline should the closure of the review period fall on a weekend or a holiday.

### *Effect of the Bill*

The bill establishes that if the last day of the timeframe for OIR to review and approve or disapprove a rate filing for property, casualty, or surety insurance, including motor vehicle insurance, or to review an insurer's form filing, falls on a weekend or holiday recognized by Florida governmental agencies or branches, then the closure of OIR's review period shall be extended until the conclusion of the next business day.

### **Rate Disapprovals Based Upon Hurricane Modeling**

The law governing OIR's review and approval of residential property insurance rate filings requires that a rate filing account for mitigation measures that policyholders undertake to reduce hurricane losses.<sup>38</sup> It sets forth the criteria under which OIR may disapprove rate filings, including disapproval of rates that are determined to be excessive, inadequate, or unfairly discriminatory.<sup>39</sup> Florida law also establishes criteria for the Florida Commission on Hurricane Loss Projection Methodology's (Commission) consideration and approval of hurricane loss models and prescribes how those models affect OIR's approval of property insurance rate filings.<sup>40</sup>

### *Effect of the Bill*

The bill provides parameters for OIR's approval or disapproval of rate filings by establishing that OIR may not disapprove a homeowner's insurance rate filing solely because the rate filing uses a modeling indication that is the weighted or straight average of two or more models currently found to be accurate or reliable by the Commission.

### **Time for Filing Property Insurance Claims**

Since an insurance policy is a contract and no limitations on insurance claims existed in the Florida Insurance Code, the five-year statute of limitation for a contract dispute was applied to insurance

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<sup>37</sup> S. 627.062, F.S. (which controls rating requirements for property and casualty insurance in general), s. 627.0651, F.S. (which controls rating requirements for motor vehicle insurance), and s. 627.410 (which controls form filings in general). While the statutes differentiate between issuance of a notice of intent to approve or disapprove a property and casualty rate filing, other than a motor vehicle rate filing, and simply approving or disapproving a motor vehicle rate filing following review, the practical effect of the review process is the same.

<sup>38</sup> S. 627.062(2)(j), F.S.

<sup>39</sup> S. 627.062, F.S.

<sup>40</sup> Ss. 627.0628–627.06281, F.S.

disputes.<sup>41</sup> However, in 2011 two types of claims were given a shorter statute of limitation. A notice of any claim, supplemental claim, or reopened claim resulting from windstorm or a hurricane must be provided to the policyholder's insurance company within three years after the windstorm caused the covered damage or the hurricane first made landfall otherwise the claim is barred.<sup>42</sup> Additionally, those claims related to a sinkhole loss are barred unless the notice of claim, including initial, supplemental, and reopened claims, is properly filed within two years after the policyholder knew or should have known about the sinkhole loss.<sup>43</sup>

#### *Effect of the Bill*

The bill modifies the property insurance claim notice requirements to make them applicable to all property insurance claims with the exception of sinkhole loss as defined in s. 627.706(2), F.S. Upon passage of the bill, notice of all property insurance claims, supplemental claims, or reopened claims must be provided to an insurer within three years after the date of loss or such claims will be barred.

### **Property Insurance Mediation Notice Requirements**

DFS administers alternative dispute resolution programs for various types of insurance, including a mediation program for property insurance claims.<sup>44</sup> For property insurance claims involving personal lines and commercial residential claims, the policyholder, as a first-party claimant, a third-party, as an assignee, or the insurer may request mediation under the DFS program; however, the insurer is not required to participate in mediation requested by a third-party assignee.<sup>45</sup> Florida law requires that, at either issuance or renewal of a property insurance policy, or at the time a first-party property insurance claim is made, an insurer must provide a policyholder with notice of its right to participate in mediation.<sup>46</sup>

#### *Effect of the Bill*

The bill establishes that, in addition to having the option to provide a policyholder with notice of its right to participate in mediation at policy issuance or renewal or at the filing of a first-party claim, an insurer also has the option to provide a policyholder with such notice at the time that the policyholder disputes a claim.

### **Residential Condominium Loss Assessments**

Loss assessment coverage is insurance coverage for condominium unit owners that provides protection for situations where the owner of a condominium unit, as the owner of shared property, is held financially responsible for: deductibles owed when a claim is made under a condominium association's property insurance policy; damage that occurs to the condominium building or the common areas of a condominium property; or injuries that occur in the common areas of a condominium property.<sup>47</sup> Florida law requires that property insurance policies held by condominium unit owners include a minimum property loss assessment coverage of \$2000 for all assessments made as a result of the same direct loss to the condominium property.<sup>48</sup> The law further establishes that the maximum amount of any unit owner's coverage that can be assessed for any loss is an amount equal

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<sup>41</sup> S. 95.11, F.S.

<sup>42</sup> Ch. 2011-39, Laws of Fla. Current law also specifies that the three-year notice requirement does not affect any applicable limitations on civil actions provided for claims, supplemental claims, or reopened claims timely filed. S. 627.70132, F.S. For example, policyholders still have five year after breach of an insurance contract by an insurer, which may include claim denial, to file suit for the breach.

<sup>43</sup> S. 627.706(5), F.S.

<sup>44</sup> S. 627.7015, F.S.

<sup>45</sup> S. 627.7015(1), F.S.

<sup>46</sup> S. 627.7015(2), F.S.

<sup>47</sup> The Balance, *Loss Assessment Explained for Condo Insurance*, <https://www.thebalance.com/loss-assessment-explained-for-condo-insurance-4060435> (last visited Jan. 8, 2020).

<sup>48</sup> S. 627.714(1), F.S.

to the unit owner's loss assessment coverage limit in effect one day before the date of an occurrence, but it does not specify exactly what occurrence is referenced.<sup>50</sup>

### *Effect of the Bill*

The bill clarifies that the amount of loss assessment coverage that can be assessed against a unit owner is based upon the coverage limit for loss assessment that was in effect in the unit owner's policy one day before the date of an occurrence that resulted in a loss for which the unit owner is being assessed. Further, the bill establishes that the coverage in place at that time applies regardless of the date on which the condominium association assesses the unit owner.

#### B. SECTION DIRECTORY:

**Section 1:** Amends s. 319.30, F.S., relating to definitions; dismantling, destruction, change of identity of motor vehicle or mobile home; salvage.

**Section 2:** Amends s. 624.155, F.S., relating to civil remedy.

**Section 3:** Creating s. 624.307, F.S., relating to general powers; duties.

**Section 4:** Amends s. 624.315, F.S., relating to department; annual report.

**Section 5:** Amends s. 627.062, F.S., relating to rate standards.

**Section 6:** Amends s. 627.0651, F.S., relating to making and use of rates for motor vehicle insurance.

**Section 7:** Amends s. 627.410, F.S., relating to filing, approval of forms.

**Section 8:** Amends s. 627.70132, F.S., relating to notice of windstorm or hurricane claim.

**Section 9:** Amends s. 627.7015, F.S., relating to alternative procedure for resolution of disputed property insurance claims.

**Section 10:** Amends s. 627.714, F.S., relating to residential condominium unit owner coverage; loss assessment coverage required.

**Section 11:** Provides an effective date of upon becoming law.

## II. 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:

None known.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill neither authorizes nor requires administrative rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**



26 specified timeframe; revising the timeframe of such  
 27 claims; revising the definition of the terms  
 28 "supplemental claim" and "reopened claim"; amending s.  
 29 627.7015, F.S.; revising the timeframe for insurers'  
 30 notification of certain mediation program; conforming  
 31 provisions to changes made by the act; amending s.  
 32 627.714, F.S.; specifying the maximum amount of loss  
 33 assessment coverage for certain unit owners; providing  
 34 an effective date.

35

36 Be It Enacted by the Legislature of the State of Florida:

37

38 Section 1. Paragraph (d) of subsection (3) of section  
 39 319.30, Florida Statutes, is amended to read:

40 319.30 Definitions; dismantling, destruction, change of  
 41 identity of motor vehicle or mobile home; salvage.--

42 (3)

43 (d) An electronic signature that is consistent with  
 44 chapter 668 satisfies any signature required under this  
 45 subsection, except that an electronic signature on an odometer  
 46 disclosure submitted through an insurance company must be  
 47 executed using an electronic signature, as defined in s.  
 48 668.003(4), that uses a system providing an Identity Assurance  
 49 Level, Authenticator Assurance Level, and Federation Assurance  
 50 Level, as described in the National Institute of Standards and

51 Technology Special Publication 800-63-3, as of December 1, 2017,  
 52 that are equivalent to or greater than+

53 ~~1. Level 2, for each level, for a certificate of~~  
 54 ~~destruction or~~

55 ~~2. Level 2-3, for each level,~~ for a salvage certificate of  
 56 title.

57 Section 2. Subsection (3) of section 624.155, Florida  
 58 Statutes, is amended to read:

59 624.155 Civil remedy.—

60 (3)(a) As a condition precedent to bringing an action  
 61 under this section, the department and the authorized insurer  
 62 must have been given 60 days' written notice of the violation.  
 63 Notice to the authorized insurer must be delivered to the name  
 64 and address designated by the insurer under s. 624.422(2).

65 (b) The notice shall be on a form provided by the  
 66 department and shall state with specificity the following  
 67 information, and such other information as the department may  
 68 require:

69 1. The statutory provision, including the specific  
 70 language of the statute, which the authorized insurer allegedly  
 71 violated.

72 2. The facts and circumstances giving rise to the  
 73 violation.

74 3. The name of any individual involved in the violation.

75 4. Reference to specific policy language that is relevant

76 to the violation, if any. If the person bringing the civil  
 77 action is a third party claimant, she or he shall not be  
 78 required to reference the specific policy language if the  
 79 authorized insurer has not provided a copy of the policy to the  
 80 third party claimant pursuant to written request.

81 5. A statement that the notice is given in order to  
 82 perfect the right to pursue the civil remedy authorized by this  
 83 section.

84 (c) No action shall lie if, within 60 days after the  
 85 authorized insurer receives the ~~filing~~ notice pursuant to  
 86 paragraph (a), the damages are paid or the circumstances giving  
 87 rise to the violation are corrected.

88 (d) The authorized insurer that is the recipient of a  
 89 notice filed pursuant to this section shall report to the  
 90 department on the disposition of the alleged violation.

91 (e) The applicable statute of limitations for an action  
 92 under this section shall be tolled for a period of:

93 1. Sixty days after the date on which appraisal is invoked  
 94 by any party in a residential property insurance claim; and

95 2. Sixty-five ~~65~~ days after the date on which ~~by the~~  
 96 ~~mailing of~~ the notice required under ~~by~~ this subsection or the  
 97 ~~mailing of a~~ subsequent notice required under ~~by~~ this subsection  
 98 is mailed.

99 (f) A notice required under this subsection may not be  
 100 filed within 60 days after appraisal is invoked by any party in

101 a residential property insurance claim.

102 Section 3. Subsection (4) of section 624.307, Florida  
 103 Statutes, is amended to read:

104 624.307 General powers; duties.—

105 (4) The department and office may each collect, propose,  
 106 publish, and disseminate information relating to the subject  
 107 matter of any duties imposed upon it by law. Aggregate  
 108 information published or disseminated by the department or  
 109 office pursuant to the powers under this subsection may include  
 110 information covered by a notice of trade secret under subsection  
 111 624.4213(1), unless the information can be individually  
 112 extrapolated, in which case the information may not be published  
 113 or disseminated by the department or the office.

114 Section 4. Subsection (4) is added to section 624.315,  
 115 Florida Statutes, to read:

116 624.315 Department; annual report.—

117 (4) The office may include information covered by a notice  
 118 of trade secret under subsection 624.4213(1) in the report under  
 119 subsection (1) or make the information available under  
 120 subsection (2), unless the information can be individually  
 121 extrapolated, in which case the information may not be published  
 122 or disseminated by the department or the office.

123 Section 5. Paragraphs (a) and (j) of subsection (2) of  
 124 section 627.062, Florida Statutes, are amended to read:

125 627.062 Rate standards.—

126 (2) As to all such classes of insurance:

127 (a) Insurers or rating organizations shall establish and  
 128 use rates, rating schedules, or rating manuals that allow the  
 129 insurer a reasonable rate of return on the classes of insurance  
 130 written in this state. A copy of rates, rating schedules, rating  
 131 manuals, premium credits or discount schedules, and surcharge  
 132 schedules, and changes thereto, must be filed with the office  
 133 under one of the following procedures:

134 1. If the filing is made at least 90 days before the  
 135 proposed effective date and is not implemented during the  
 136 office's review of the filing and any proceeding and judicial  
 137 review, such filing is considered a "file and use" filing. In  
 138 such case, the office shall finalize its review by issuance of a  
 139 notice of intent to approve or a notice of intent to disapprove  
 140 within 90 days after receipt of the filing. The notice of intent  
 141 to approve and the notice of intent to disapprove constitute  
 142 agency action for purposes of the Administrative Procedure Act.  
 143 Requests for supporting information, requests for mathematical  
 144 or mechanical corrections, or notification to the insurer by the  
 145 office of its preliminary findings does not toll the 90-day  
 146 period during any such proceedings and subsequent judicial  
 147 review. The rate shall be deemed approved if the office does not  
 148 issue a notice of intent to approve or a notice of intent to  
 149 disapprove within 90 days after receipt of the filing.

150 2. If the filing is not made in accordance with

151 subparagraph 1., such filing must be made as soon as  
 152 practicable, but within 30 days after the effective date, and is  
 153 considered a "use and file" filing. An insurer making a "use and  
 154 file" filing is potentially subject to an order by the office to  
 155 return to policyholders those portions of rates found to be  
 156 excessive, as provided in paragraph (h).

157 3. If the last day of the 90-day timeframe for the  
 158 issuance of a notice of intent under subparagraph 1. ends on a  
 159 weekend or a holiday specified in s. 110.117, the closure of the  
 160 office's review period shall be extended until the conclusion of  
 161 the next business day.

162 ~~3. For all property insurance filings made or submitted~~  
 163 ~~after January 25, 2007, but before May 1, 2012, an insurer~~  
 164 ~~seeking a rate that is greater than the rate most recently~~  
 165 ~~approved by the office shall make a "file and use" filing. For~~  
 166 ~~purposes of this subparagraph, motor vehicle collision and~~  
 167 ~~comprehensive coverages are not considered property coverages.~~

168 (j) With respect to residential property insurance rate  
 169 filings:<sup>7</sup>

170 1. The rate filing must account for mitigation measures  
 171 undertaken by policyholders to reduce hurricane losses.

172 2. The office may not disapprove a rate for homeowners'  
 173 insurance solely because the rate filing uses a modeling  
 174 indication that is the weighted or straight average of two or  
 175 more models currently found to be accurate or reliable pursuant

176 to s. 627.0628.

177

178 The provisions of this subsection do not apply to workers'  
 179 compensation, employer's liability insurance, and motor vehicle  
 180 insurance.

181 Section 6. Paragraph (a) of subsection (1) of section  
 182 627.0651, Florida Statutes, is amended to read:

183 627.0651 Making and use of rates for motor vehicle  
 184 insurance.—

185 (1) Insurers shall establish and use rates, rating  
 186 schedules, or rating manuals to allow the insurer a reasonable  
 187 rate of return on motor vehicle insurance written in this state.  
 188 A copy of rates, rating schedules, and rating manuals, and  
 189 changes therein, shall be filed with the office under one of the  
 190 following procedures:

191 (a)1. If the filing is made at least 60 days before the  
 192 proposed effective date and the filing is not implemented during  
 193 the office's review of the filing and any proceeding and  
 194 judicial review, such filing shall be considered a "file and  
 195 use" filing. In such case, the office shall initiate proceedings  
 196 to disapprove the rate and so notify the insurer or shall  
 197 finalize its review within 60 days after receipt of the filing.  
 198 Notification to the insurer by the office of its preliminary  
 199 findings shall toll the 60-day period during any such  
 200 proceedings and subsequent judicial review. The rate shall be

201 | deemed approved if the office does not issue notice to the  
 202 | insurer of its preliminary findings within 60 days after the  
 203 | filing.

204 |       2. If the last day of the 60-day timeframe for the  
 205 | office's notification or review finalization under subparagraph  
 206 | 1. ends on a weekend or a holiday specified in s. 110.117, the  
 207 | closure of the office's review period shall be extended until  
 208 | the conclusion of the next business day.

209 |       Section 7. Subsection (2) of section 627.410, Florida  
 210 | Statutes, is amended to read:

211 |       627.410 Filing, approval of forms.—

212 |       (2) (a) Every such filing must be made at least 30 days in  
 213 | advance of any such use or delivery. At the expiration of the 30  
 214 | days, the form filed will be deemed approved unless prior  
 215 | thereto it has been affirmatively approved or disapproved by  
 216 | order of the office. The approval of such form by the office  
 217 | constitutes a waiver of any unexpired portion of such waiting  
 218 | period. The office may extend the period within which it may  
 219 | affirmatively approve or disapprove such form by up to 15 days  
 220 | by giving notice of such extension before expiration of the  
 221 | initial 30-day period. At the expiration of such extended  
 222 | period, and in the absence of prior affirmative approval or  
 223 | disapproval, such form shall be deemed approved.

224 |       (b) If the last day of the initial 30-day period, or the  
 225 | last day of the 15-day extension authorized by the office, under

226 paragraph (a) ends on a weekend or a holiday specified in s.  
 227 110.117, the closure of the review period shall be extended  
 228 until the conclusion of the next business day.

229 Section 8. Section 627.70132, Florida Statutes, is amended  
 230 to read:

231 627.70132 Notice of property insurance ~~windstorm or~~  
 232 ~~hurricane~~ claim. Except for a sinkhole loss as defined in  
 233 627.706(2), a claim, supplemental claim, or reopened claim under  
 234 an insurance policy that provides property insurance, as defined  
 235 in s. 624.604, ~~for loss or damage caused by the peril of~~  
 236 ~~windstorm or hurricane~~ is barred unless notice of the claim,  
 237 supplemental claim, or reopened claim is ~~was~~ given to the  
 238 insurer in accordance with the terms of the policy within 3  
 239 years after the date of loss ~~the hurricane first made landfall~~  
 240 ~~or the windstorm caused the covered damage.~~ For purposes of this  
 241 section, the term "supplemental claim" or "reopened claim" means  
 242 any additional claim for recovery from the insurer for losses  
 243 ~~from the same hurricane or windstorm~~ which the insurer has  
 244 previously adjusted pursuant to the initial claim. This section  
 245 does not affect any applicable limitation on civil actions  
 246 provided in s. 95.11 for claims, supplemental claims, or  
 247 reopened claims timely filed under this section.

248 Section 9. Subsection (2) and paragraph (e) of subsection  
 249 (9) of section 627.7015, Florida Statutes, are amended to read:

250 627.7015 Alternative procedure for resolution of disputed

251 property insurance claims.-

252 ~~(2) At the time of issuance and renewal of a policy or at~~  
 253 ~~the time a first-party claim within the scope of this section is~~  
 254 ~~filed by the policyholder,~~ The insurer shall notify the  
 255 policyholder of its right to participate in the mediation  
 256 program under this section and shall choose any of the following  
 257 times to provide the notification:

258 (a) Upon the issuance and renewal of a policy; or

259 (b) At the time the policyholder:

260 1. Disputes a claim; or

261 2. Files a first-party claim within the scope of this  
 262 section.

263  
 264 The department shall prepare a consumer information pamphlet for  
 265 distribution to persons participating in mediation.

266 (9) For purposes of this section, the term "claim" refers  
 267 to any dispute between an insurer and a policyholder relating to  
 268 a material issue of fact other than a dispute:

269 (e) With respect to a property ~~windstorm or hurricane~~ loss  
 270 that does not comply with s. 627.70132.

271 Section 10. Subsection (2) of section 627.714, Florida  
 272 Statutes, is amended to read:

273 627.714 Residential condominium unit owner coverage; loss  
 274 assessment coverage required.-

275 (2) The maximum amount of any unit owner's loss assessment

276 coverage that can be assessed for any loss shall be an amount  
 277 equal to that unit owner's loss assessment coverage limit in  
 278 effect 1 day before the date of the occurrence that gave rise to  
 279 the loss. Such coverage applies to any loss assessment  
 280 regardless of the date of the assessment by the association. Any  
 281 changes to the limits of a unit owner's coverage for loss  
 282 assessments made on or after the day before the date of the  
 283 occurrence do ~~are~~ not apply ~~applicable~~ to such loss.

284 Section 11. This act shall take effect upon becoming a  
 285 law.

## INSURANCE & BANKING SUBCOMMITTEE

### PCS for HB 359 by Rep. Santiago Insurance

#### AMENDMENT SUMMARY January 15, 2020

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**Amendment 1 by Rep. Santiago (Line 56):** The amendment allows an employee who is receiving workers' compensation payments to authorize a carrier to transmit compensation payments to a money transmitter, and the amendment specifies that the carrier's transmission of compensation to the employee's money transmitter account satisfies the carrier's obligation to pay compensation directly to the employee.

**Amendment 2 by Rep. Santiago (Line 228):** The amendment provides that the American Law Institute's Restatement of the Law, Liability Insurance, cannot be used as statement of Florida law when it is inconsistent with, in conflict with, or not otherwise addressed by existing constitutional law or Florida statutory law, case law, or common law.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. PCS for HB 359 (2020)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

---

1 Committee/Subcommittee hearing bill: Insurance & Banking  
2 Subcommittee

3 Representative Santiago offered the following:

4

5 **Amendment (with title amendment)**

6 Between lines 56 and 57, insert:

7 Section 2. Paragraph (a) of subsection (1) of section  
8 440.12, Florida Statutes, is amended to read:

9 440.12 Time for commencement and limits on weekly rate of  
10 compensation.—

11 (1) Compensation is not allowed for the first 7 days of  
12 the disability, except for benefits provided under s. 440.13.  
13 However, if the injury results in more than 21 days of  
14 disability, compensation is allowed from the commencement of the  
15 disability.

PCS for HB 359 a1

Published On: 1/14/2020 7:59:46 PM

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. PCS for HB 359 (2020)

Amendment No. 1

16 (a) All weekly compensation payments, except for the first  
17 payment, must be paid by check or, if authorized by the  
18 employee, on a prepaid card pursuant to paragraph (b) or  
19 deposited directly into the employee's account at a financial  
20 institution as defined in s. 655.005 or transmitted to the  
21 employee's account with a money transmitter licensed under part  
22 II of chapter 560.

23 Section 3. Paragraph (a) of subsection (1) and paragraph  
24 (a) of subsection (6) of section 440.20, Florida Statutes, are  
25 amended to read:

26 440.20 Time for payment of compensation and medical bills;  
27 penalties for late payment.—

28 (1)(a) Unless the carrier denies compensability or  
29 entitlement to benefits, the carrier shall pay compensation  
30 directly to the employee as required by ss. 440.14, 440.15, and  
31 440.16, in accordance with those sections. Upon receipt of the  
32 employee's authorization as provided for in s. 440.12(1)(a), the  
33 carrier's obligation to pay compensation directly to the  
34 employee is satisfied when the carrier directly deposits, by  
35 electronic transfer or other means, compensation into the  
36 employee's account at a financial institution as defined in s.  
37 655.005 or onto a prepaid card in accordance with s. 440.12(1)  
38 or transmits the employee's compensation to the employee's  
39 account with a money transmitter licensed under part II of  
40 chapter 560. Compensation by direct deposit or through the use

PCS for HB 359 a1

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Amendment No. 1

41 of a prepaid card or through transmission is considered paid on  
42 the date the funds become available for withdrawal by the  
43 employee.

44 (6) (a) If any installment of compensation for death or  
45 dependency benefits, or compensation for disability benefits  
46 payable without an award is not paid within 7 days after it  
47 becomes due, as provided in subsection (2), subsection (3), or  
48 subsection (4), there shall be added to such unpaid installment  
49 a penalty of an amount equal to 20 percent of the unpaid  
50 installment, which shall be paid at the same time as, but in  
51 addition to, such installment of compensation. This penalty  
52 shall not apply for late payments resulting from conditions over  
53 which the employer or carrier had no control. When any  
54 installment of compensation payable without an award has not  
55 been paid within 7 days after it became due and the claimant  
56 concludes the prosecution of the claim before a judge of  
57 compensation claims without having specifically claimed  
58 additional compensation in the nature of a penalty under this  
59 section, the claimant will be deemed to have acknowledged that,  
60 owing to conditions over which the employer or carrier had no  
61 control, such installment could not be paid within the period  
62 prescribed for payment and to have waived the right to claim  
63 such penalty. However, during the course of a hearing, the judge  
64 of compensation claims shall on her or his own motion raise the  
65 question of whether such penalty should be awarded or excused.

PCS for HB 359 a1

Published On: 1/14/2020 7:59:46 PM

Amendment No. 1

66 The department may assess without a hearing the penalty against  
67 either the employer or the carrier, depending upon who was at  
68 fault in causing the delay. The insurance policy cannot provide  
69 that this sum will be paid by the carrier if the department or  
70 the judge of compensation claims determines that the penalty  
71 should be paid by the employer rather than the carrier. Any  
72 additional installment of compensation paid by the carrier  
73 pursuant to this section shall be paid directly to the employee  
74 by check or, if authorized by the employee, by direct deposit  
75 into the employee's account at a financial institution or by  
76 transmission to the employee's account with a money transmitter  
77 licensed under part II of chapter 560.

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79

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81

-----  
**T I T L E   A M E N D M E N T**

82

Between lines 4 and 5, insert:

83

amending s. 440.12, F.S.; providing that an employee

84

receiving workers' compensation payments may authorize

85

a carrier to transmit compensation payments to a money

86

transmitter; amending s. 440.20, F.S.; specifying that

87

the carrier's transmission of compensation to the

88

employee's money transmitter account satisfies the

89

carrier's obligation to pay compensation directly to

90

the employee;

PCS for HB 359 a1

Published On: 1/14/2020 7:59:46 PM

Amendment No. 2

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

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1 Committee/Subcommittee hearing bill: Insurance & Banking  
2 Subcommittee

3 Representative Santiago offered the following:  
4

5 **Amendment (with title amendment)**

6 Between lines 228 and 229, insert:

7 Section 8. Subsection (10) is added to section 627.419,  
8 Florida Statutes, to read:

9 627.419 Construction of policies.—

10 (10) A statement of the law in the American Law Institute's  
11 Restatement of the Law, Liability Insurance does not constitute  
12 the law or public policy of this state if the statement of the  
13 law is inconsistent or in conflict with, or otherwise not  
14 addressed by:

15 (a) The Constitution of the United States or of this state;

16 (b) A statute of this state;

PCS for HB 359 a2

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Amendment No. 2

- 17 |       (c) This state's case law precedent; or  
18 |       (d) Other common law that may have been adopted by this  
19 | state.

20 | -----  
21 | -----

22 |                   **T I T L E   A M E N D M E N T**

23 |       Remove line 22 and insert:

24 |       circumstances; amending s. 627.419, F.S.; limiting construction  
25 |       of liability insurance law in certain circumstances; amending s.  
26 |       627.70132, F.S.; revising



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 529 Insurance Guaranty Associations  
**SPONSOR(S):** Webb  
**TIED BILLS:** IDEN./SIM. BILLS: SB 898

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee		Fortenberry	Cooper
2) Ways & Means Committee			
3) Commerce Committee			

### SUMMARY ANALYSIS

A condominium is a form of ownership of real property comprised of units along with an undivided right of access to common elements. A condominium association is responsible for the operation and maintenance of the common elements and all unit owners are members of the condominium association. A condominium association must use its best efforts to maintain an insurance policy for the benefit of the association, the association property, and the common elements belonging to all condominium unit owners.

Florida law provides for guaranty associations to ensure policyholders of insolvent insurers are protected with respect to insurance premiums paid and settlement of outstanding claims. Insurers are required to participate in the guaranty associations as a condition of transacting insurance business in Florida. Florida operates four guaranty associations including the Florida Insurance Guaranty Association (FIGA).

FIGA issues guaranty fund payments for all lines of property and casualty insurance, including policies written to condominium associations, with certain exceptions. FIGA maintains two accounts, including one for auto insurers and one for all other property and casualty insurers that are covered by FIGA. Florida law provides that FIGA is only obligated to pay the portions of claims, made to insolvent property and casualty insurers, which are in excess of \$100, and less than \$300,000. For policies providing homeowner's insurance coverage, FIGA shall provide for an additional \$200,000 for the portion of a covered claim which related to the damage to the structure and contents. However, for policies covering condominium associations FIGA is only obligated to pay the amount of each property insurance claim which is less than \$100,000 for each condominium unit.

If an insurer's assets are insufficient to pay all claims, FIGA can issue post-insolvency to obtain funds to pay the remaining claims. The assessments levied against any insurer in a calendar year may not exceed more than two percent of that insurer's net direct written premium in Florida for the kinds of insurance within an account maintained by FIGA. In the event that these assessments are insufficient to cover claims of insurers rendered insolvent by the effects of a hurricane, FIGA may levy emergency assessments, in an amount not to exceed two percent of that insurer's net written premiums written in Florida for the kinds of insurance within an account.

The bill changes the amount of coverage that FIGA must provide for each condominium unit within a condominium association from \$100,000 to \$200,000, per condominium unit for property insurance claims made under a condominium association policy and covered by FIGA. The bill also changes the amount of the emergency assessments that FIGA is authorized to levy against any insurer from a maximum of two percent of that insurer's net written premiums in Florida for the kinds of insurance within either the auto or all other insurance accounts maintained by FIGA to a maximum of four percent of the same premiums.

This bill does not impact local or state government revenues or expenditures. It potentially has both positive and negative direct economic impacts on the private sector.

This bill has an effective date of July 1, 2020.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Condominiums and Condominium Associations**

A condominium is a form of ownership of real property created pursuant to ch. 718, F.S., comprised of units, which may be owned by one or more persons, along with an undivided right of access to common elements.<sup>1</sup> Common elements are those portions of condominium property not located within the boundaries of the individual condominium units<sup>2</sup> and are considered jointly owned by all of the condominium unit owners. Examples of common elements include roofs, heating and air conditioning systems, exterior walls, pipes, and electrical systems.

A condominium is created by recording a declaration of condominium in the public records of the county where the condominium is located.<sup>3</sup> The declaration governs the relationships among condominium unit owners and a condominium association. The condominium association is an entity responsible for the operation and maintenance of the common elements owned by the unit owners, and all unit owners of condominiums are members of the condominium association. The condominium association is overseen by an elected board of directors, commonly referred to as a board of administration.<sup>4</sup> The board enacts bylaws, which govern administration of the condominium association.<sup>5</sup>

##### *Insurance Policies Held by Condominium Associations*

A condominium association must use its best efforts to maintain an insurance policy for the benefit of the association, the association property, and the common elements belonging to all condominium unit owners. One of the most significant common elements typically covered by condominium association insurance is roofs. Roofs are also some of the most likely elements to be severely damaged in a windstorm or hurricane. Condominium association insurance coverage does not include personal property within a unit or a unit's limited common elements, floor, wall, ceiling coverings, electrical fixtures, appliances, water heaters, water filters, built-in cabinets and countertops, and window treatments.<sup>6</sup> Insurance coverage for such property is the responsibility of the unit owner.<sup>7</sup>

##### **Guaranty Associations**

Under federal law, insurance companies cannot file for bankruptcy.<sup>8</sup> Instead, they are either rehabilitated or liquidated by their state of domicile. Florida law establishes the system for the treatment of impaired or insolvent insurers<sup>9</sup> in Florida and sets up guaranty payments where necessary.<sup>10</sup> Florida law provides for guaranty associations to ensure policyholders of insolvent insurers are protected with respect to insurance premiums paid and settlement of outstanding claims,

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<sup>1</sup> S. 718.103(11), F.S.

<sup>2</sup> S. 718.103(8), F.S.

<sup>3</sup> S. 718.104(2), F.S.

<sup>4</sup> S. 718.111, F.S.

<sup>5</sup> S. 718.112, F.S.

<sup>6</sup> S. 718.111, F.S.

<sup>7</sup> *Id.*

<sup>8</sup> 11 U.S.C. § 109(b)(2).

<sup>9</sup> "An 'insolvent insurer' means an insurer that was authorized to transact insurance in this state, either at the time the policy was issued or when the insured event occurred, and against which an order of liquidation with a finding of insolvency has been entered by a court of competent jurisdiction if such order has become final by the exhaustion of appellate review." S. 631.54(7), F.S.

<sup>10</sup> Ch. 631, F.S.

up to limits provided by law.<sup>11</sup> A guaranty association is a not-for-profit corporation created by law and directed to protect policyholders from financial losses and delays in claims payment and settlements due to the insolvency of an insurer.<sup>12</sup> Insurers are required to participate in the guaranty associations as a condition of transacting insurance business in Florida. Florida operates four guaranty associations including the Florida Insurance Guaranty Association (FIGA)<sup>13</sup>.

### *Florida Insurance Guaranty Association*

FIGA provides a “mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer.”<sup>14</sup> It issues guaranty fund payments and provides related services for all lines of property and casualty insurance, including policies written to condominium associations, with certain exceptions.<sup>15</sup> When a Florida property and casualty insurer becomes insolvent, FIGA takes over the claims of that insurer and pays the claims of its policyholders, ensuring that policyholders are not left with unpaid claims. FIGA obtains funds to pay the claims of insolvent insurers located in Florida from the liquidation of the assets of insolvent insurers by the Division of Rehabilitation and Liquidation (the Division) in the Florida Department of Financial Services (DFS) and from the liquidation of assets of insolvent insurers located outside Florida that transact insurance business in Florida.<sup>16</sup>

Florida law provides that FIGA is only obligated to pay the portions of claims made to insolvent property and casualty insurers, which are in excess of \$100, and less than \$300,000.<sup>17</sup> It further establishes that for policies providing homeowner’s insurance coverage, FIGA shall provide for an additional \$200,000 for the portion of a covered claim which related to the damage to the structure and contents.<sup>18</sup> However, for policies covering condominium associations, which the condominium associations have a responsibility to provide insurance coverage on residential units within the association, FIGA is only obligated to pay the amount of each property insurance claim which is less than \$100,000 for each condominium unit.<sup>19</sup>

When an insolvent insurer is liquidated in Florida, FIGA assumes the claims and is “deemed the insurer to the extent of its obligation on...covered claims, and,...shall have all rights, duties, defenses, and obligations of the insolvent insurer as if the insurer had not become insolvent.”<sup>20</sup> If an insurer’s assets are insufficient to pay all claims, FIGA can also issue post-insolvency assessment to obtain funds to pay the remaining claims.<sup>21</sup> Currently, the assessments levied against any insurer in a calendar year may not exceed more than two percent of that insurer’s net direct written premium in Florida for the kinds of insurance within an account.<sup>22</sup>

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<sup>11</sup> *Id.*  
<sup>12</sup> *See e.g.*, ss. 631.51 and 631.902, F.S.  
<sup>13</sup> Ch. 631, part II, F.S.  
<sup>14</sup> S. 631.51, F.S.  
<sup>15</sup> S. 631.52, F.S.  
<sup>16</sup> *See* s. 631.061, F.S. for grounds for liquidation. *See* s. 631.025, F.S., for an overview of persons subject to proceedings initiated by the Division.  
<sup>17</sup> S. 631.57(1), F.S.  
<sup>18</sup> *Id.*  
<sup>19</sup> *Id.*  
<sup>20</sup> S. 631.57, F.S.  
<sup>21</sup> *Id.*  
<sup>22</sup> S. 631.57(3)(a), F.S. As established in s. 632.52, F.S., FIGA covers “all kinds of direct insurance” with certain exceptions, such as life, annuity, health, disability, workers’ compensation, and surplus lines insurance. FIGA maintains two accounts, including one for auto insurance and one for all other property and casualty insurance who are covered by FIGA. When an auto insurer’s assets are insufficient to pay claims, all auto insurers within the auto account are assessed. When another property and casualty insurer’s assets are insufficient to pay claims, all insurers within the all other account are assessed.

In the event that these assessments are insufficient to cover claims of insurers rendered insolvent by the effects of a hurricane, FIGA may levy emergency assessments.<sup>23</sup> The emergency assessments levied against any insurer in any one calendar year may not exceed more than two percent of that insurer's net written premiums written in Florida for the kinds of insurance within either the auto or all other insurance accounts maintained by FIGA.<sup>24</sup>

### **Effect of Bill**

The bill changes the amount of coverage that FIGA must provide for each condominium unit within a condominium association from \$100,000 to \$200,000, per condominium unit for property insurance claims made under a condominium association policy and covered by FIGA.

The bill also changes the amount of the emergency assessments that FIGA is authorized to levy against any insurer from a maximum of two percent of that insurer's net written premiums in Florida for the kinds of insurance within either the auto or all other insurance accounts maintained by FIGA to a maximum of four percent of the same premiums.

#### **B. SECTION DIRECTORY:**

**Section 1.** Amends s. 631.57, F.S., relating to duties and powers of the association.

**Section 2.** Provides an effective date of July 1, 2020.

## **II. 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:**

This bill has a positive effect on the private sector by providing additional coverage for condominium unit owners when claims on condominium association policies must be paid by FIGA. It also has the potential to have a negative impact on the private sector if FIGA deems it necessary to exercise its increased emergency assessment authority. However, the potential for FIGA to exercise its emergency assessment authority is more remote than the potential exercise of the initial assessment authority.

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<sup>23</sup> S. 631.57(3)(e)1., F.S.

<sup>24</sup> *Id.*

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

**1. Applicability of Municipality/County Mandates Provision:**

Not applicable. This bill does not appear to affect county or municipal governments.

**2. Other:**

None.

**B. RULE-MAKING AUTHORITY:**

The bill neither authorizes nor requires administrative rulemaking.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

1                   A bill to be entitled  
 2           An act relating to insurance guaranty associations;  
 3           amending s. 631.57, F.S.; revising the obligations of  
 4           the Florida Insurance Guaranty Association,  
 5           Incorporated, for policies covering condominium  
 6           associations and homeowners' associations; revising  
 7           the percentage limits on the emergency assessments  
 8           levied against insurers by the Office of Insurance  
 9           Regulation; providing an effective date.

10  
 11 Be It Enacted by the Legislature of the State of Florida:

12  
 13           Section 1. Paragraph (a) of subsection (1) and paragraph  
 14           (e) of subsection (3) of section 631.57, Florida Statutes, are  
 15           amended to read:

16           631.57 Powers and duties of the association.—

17           (1) The association shall:

18           (a)1. Be obligated to the extent of the covered claims  
 19           existing:

20           a. Prior to adjudication of insolvency and arising within  
 21           30 days after the determination of insolvency;

22           b. Before the policy expiration date if less than 30 days  
 23           after the determination; or

24           c. Before the insured replaces the policy or causes its  
 25           cancellation, if she or he does so within 30 days of the

26 determination.

27           2. The obligation under subparagraph 1. includes only the  
 28 amount of each covered claim which is in excess of \$100 and is  
 29 less than \$300,000, except that policies providing coverage for  
 30 homeowner's insurance shall provide for an additional \$200,000  
 31 for the portion of a covered claim which relates only to the  
 32 damage to the structure and contents.

33           3.a. Notwithstanding subparagraph 2., the obligation under  
 34 subparagraph 1. for policies covering condominium associations  
 35 or homeowners' associations, which associations have a  
 36 responsibility to provide insurance coverage on residential  
 37 units within the association, shall include that amount of each  
 38 covered property insurance claim which is less than \$200,000  
 39 ~~\$100,000~~ multiplied by the number of condominium units or other  
 40 residential units; however, as to homeowners' associations, this  
 41 sub-subparagraph applies only to claims for damage or loss to  
 42 residential units and structures attached to residential units.

43           b. Notwithstanding sub-subparagraph a., the association  
 44 has no obligation to pay covered claims that are to be paid from  
 45 the proceeds of bonds issued under s. 631.695. However, the  
 46 association shall assign and pledge the first available moneys  
 47 from all or part of the assessments to be made under paragraph  
 48 (3)(a) to or on behalf of the issuer of such bonds for the  
 49 benefit of the holders of such bonds. The association shall  
 50 administer any such covered claims and present valid covered

51 | claims for payment in accordance with the provisions of the  
 52 | assistance program in connection with which such bonds have been  
 53 | issued.

54 |         4. In no event shall the association be obligated to a  
 55 | policyholder or claimant in an amount in excess of the  
 56 | obligation of the insolvent insurer under the policy from which  
 57 | the claim arises.

58 |         (3)

59 |         (e)1. In addition to assessments authorized in paragraph  
 60 | (a), and to the extent necessary to secure the funds for the  
 61 | account specified in s. 631.55(2)(b) for the direct payment of  
 62 | covered claims of insurers rendered insolvent by the effects of  
 63 | a hurricane and to pay the reasonable costs to administer such  
 64 | claims, or to retire indebtedness, including, without  
 65 | limitation, the principal, redemption premium, if any, and  
 66 | interest on, and related costs of issuance of, bonds issued  
 67 | under s. 631.695 and the funding of any reserves and other  
 68 | payments required under the bond resolution or trust indenture  
 69 | pursuant to which such bonds have been issued, the office, upon  
 70 | certification of the board of directors, shall levy emergency  
 71 | assessments upon insurers holding a certificate of authority.  
 72 | The emergency assessments levied against any insurer may not  
 73 | exceed in any one calendar year more than 4 ~~2~~ percent of that  
 74 | insurer's net written premiums in this state for the kinds of  
 75 | insurance within the account specified in s. 631.55(2)(b).

76           2. Emergency assessments authorized under this paragraph  
 77 shall be levied by the office upon insurers in accordance with  
 78 paragraph (f), upon certification as to the need for such  
 79 assessments by the board of directors. If the board participates  
 80 in the issuance of bonds in accordance with s. 631.695,  
 81 emergency assessments shall be levied in each year that bonds  
 82 issued under s. 631.695 and secured by such emergency  
 83 assessments are outstanding in amounts up to such 2-percent  
 84 limit as required in order to provide for the full and timely  
 85 payment of the principal of, redemption premium, if any, and  
 86 interest on, and related costs of issuance of, such bonds. The  
 87 emergency assessments are assigned and pledged to the  
 88 municipality, county, or legal entity issuing bonds under s.  
 89 631.695 for the benefit of the holders of such bonds in order to  
 90 provide for the payment of the principal of, redemption premium,  
 91 if any, and interest on such bonds, the cost of issuance of such  
 92 bonds, and the funding of any reserves and other payments  
 93 required under the bond resolution or trust indenture pursuant  
 94 to which such bonds have been issued, without further action by  
 95 the association, the office, or any other party. If bonds are  
 96 issued under s. 631.695 and the association determines to secure  
 97 such bonds by a pledge of revenues received from the emergency  
 98 assessments, such bonds, upon such pledge of revenues, shall be  
 99 secured by and payable from the proceeds of such emergency  
 100 assessments, and the proceeds of emergency assessments levied

101 | under this paragraph shall be remitted directly to and  
 102 | administered by the trustee or custodian appointed for such  
 103 | bonds.

104 |         3. Emergency assessments used to defease bonds issued  
 105 | under this part may be payable in a single payment or, at the  
 106 | option of the association, may be payable in 12 monthly  
 107 | installments with the first installment being due and payable at  
 108 | the end of the month after an emergency assessment is levied and  
 109 | subsequent installments being due by the end of each succeeding  
 110 | month.

111 |         4. If emergency assessments are imposed, the report  
 112 | required by s. 631.695(7) must include an analysis of the  
 113 | revenues generated from the emergency assessments imposed under  
 114 | this paragraph.

115 |         5. If emergency assessments are imposed, the references in  
 116 | sub-subparagraph (1)(a)3.b. and s. 631.695(2) and (7) to  
 117 | assessments levied under paragraph (a) must include emergency  
 118 | assessments imposed under this paragraph.

119 |         6. If the board of directors participates in the issuance  
 120 | of bonds in accordance with s. 631.695, an annual assessment  
 121 | under this paragraph shall continue while the bonds issued with  
 122 | respect to which the assessment was imposed are outstanding,  
 123 | including any bonds the proceeds of which were used to refund  
 124 | bonds issued pursuant to s. 631.695, unless adequate provision  
 125 | has been made for the payment of the bonds in the documents

126 | authorizing the issuance of such bonds.

127 |       Section 2. This act shall take effect July 1, 2020.

**INSURANCE & BANKING SUBCOMMITTEE**

**HB 529 by Rep. Webb  
Insurance Guaranty Associations**

**AMENDMENT SUMMARY  
January 15, 2020**

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**Amendment 1 by Rep. Webb (Line 83):** The amendment makes a technical change to conform Line 83 of the bill to Line 74 regarding the percentage of the emergency assessment.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 529 (2020)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

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1 Committee/Subcommittee hearing bill: Insurance & Banking

2 Subcommittee

3 Representative Webb offered the following:

4

5 **Amendment**

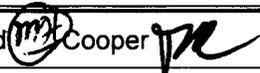
6 Remove line 83 and insert:

7 assessments are outstanding in amounts up to such 42-percent



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 813 Protection of Vulnerable Investors  
**SPONSOR(S):** McClure  
**TIED BILLS:** IDEN./SIM. **BILLS:** SB 1672

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee		Hinshelwood	
2) Children, Families & Seniors Subcommittee			
3) Commerce Committee			

### SUMMARY ANALYSIS

Although investment fraud is not a new occurrence in the financial marketplace, recent economic forces such as the rise of technology and the information age have created an environment conducive to swindlers practicing their craft. In an effort to address financial exploitation of seniors, the Financial Industry Regulatory Authority (FINRA), of which most securities broker-dealers are members, implemented rules to provide its members with the ability to place a hold on a disbursement of funds or securities from a customer's account if they have a reasonable basis to believe that financial exploitation of a "specified adult" has occurred, is occurring, has been attempted, or will be attempted. The term "specified adult" refers to a natural person age 65 and older; or a natural person age 18 and older who the FINRA member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests. These rules took effect February 5, 2018. However, they do not apply to broker-dealers and investment advisers who are not FINRA members.

Similar to the FINRA rules, the bill allows a dealer or investment adviser to delay a transaction on, or disbursement of funds or securities from, the account of a specified adult or an account for which a specified adult is a beneficiary or beneficial owner if the dealer or investment adviser reasonably believes that financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted in connection with the transaction or disbursement. A specified adult is an individual who is age 65 or older or who meets the definition of "vulnerable adult" under Florida's Adult Protective Services Act.

The suspected exploitation must be immediately reported to the Florida Abuse Hotline if so required by the Adult Protective Services Act. Within three business days of placing a delay, the dealer or investment adviser must notify all parties authorized to transact business on the account as well as any designated trusted contact, unless such person is believed to be engaged in the suspected exploitation. Within three business days of placing or extending a delay, the dealer or investment adviser must notify the Office of Financial Regulation of the delay or extension and the reason for it.

A delay expires in 15 business days but may be terminated sooner. The dealer or investment adviser may extend the delay for up to an additional 10 business days. The length of the hold may be shortened or extended by a court of competent jurisdiction. The bill requires a dealer or investment adviser to have training policies or programs reasonably designed to educate associated persons on issues pertaining to exploitation. A dealer, investment adviser, or associated person is presumed to be acting based upon a reasonable belief and is immune from civil or administrative liability, unless lack of such reasonable belief is shown by a preponderance of the evidence.

The bill has no fiscal impact on local governments, an indeterminate fiscal impact on state government, and an indeterminate positive fiscal impact on the private sector.

The bill provides an effective date of July 1, 2020.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

###### *Federal Securities Regulation*

The federal Securities Exchange Act of 1934 ('34 Act) requires registration of securities market participants like broker-dealers and exchanges.<sup>1</sup> Generally, any person acting as “broker” or “dealer” as defined in the '34 Act must be registered with the United States Securities and Exchange Commission (SEC) and join a self-regulatory organization (SRO), like the Financial Industry Regulatory Authority (FINRA) or a national securities exchange. The '34 Act broadly defines “broker” as “any person engaged in the business of effecting transactions in securities for the account of others,” which the SEC has interpreted to include involvement in any of the key aspects of a securities transaction, including solicitation, negotiation, and execution.<sup>2</sup> A “dealer” is “any person engaged in the business of buying and selling securities . . . for such person’s own account through a broker or otherwise.”<sup>3</sup> Certain entities in the securities industry are often referred to as “broker-dealers” because the institution is a “broker” when executing trades on behalf of a customer, but is a “dealer” when executing trades for its own account. In addition to being registered with the SEC, broker-dealers must comply with state registration requirements.

###### *State Securities Regulation*

In addition to federal securities laws, “Blue Sky Laws” are state laws designed to protect investors against fraudulent sales practices and activities by requiring companies making offerings of securities to register their offerings before they can be sold in that state and by requiring licensure for brokerage firms, their brokers, and investment adviser representatives.<sup>4</sup>

In Florida, the Office of Financial Regulation’s (OFR’s) Division of Securities oversees the Securities and Investor Protection Act, ch. 517, F.S., which regulates the offer and sale of securities in, to, or from Florida by firms, branch offices, and individuals affiliated with these firms.

The Securities and Investor Protection Act requires the following individuals or businesses to be registered with OFR under s. 517.12, F.S., in order for such persons to sell or offer to sell any securities in or from offices in this state, or to sell securities to persons in this state from offices outside this state:<sup>5</sup>

- “Dealers,” which include:<sup>6</sup>
  - Any person, other than an associated person registered under ch. 517, F.S., who engages, either for all or part of her or his time, directly or indirectly, as broker or principal in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.
  - Any issuer who through persons directly compensated or controlled by the issuer engages, either for all or part of her or his time, directly or indirectly, in the business of offering or selling securities which are issued or are proposed to be issued by the issuer.

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<sup>1</sup> 15 U.S.C. §§ 78c(a)(4) and 78o; U.S. Securities and Exchange Commission, *Guide to Broker-Dealer Registration*, <http://www.sec.gov/divisions/marketreg/bdguide.htm#II> (last visited Jan. 10, 2020).

<sup>2</sup> *Id.*

<sup>3</sup> 15 U.S.C. §§ 78c(a)(5).

<sup>4</sup> U.S. Securities and Exchange Commission, *Blue Sky Laws*, <http://www.sec.gov/answers/bluesky.htm> (last visited Jan. 10, 2020).

<sup>5</sup> S. 517.12(1), F.S.

<sup>6</sup> S. 517.021(6)(a), F.S. The term “dealer”, as defined under Florida law, encompasses the definitions of “broker” and “dealer” under federal law.

- “Investment advisers,” which:<sup>7</sup>
  - Include any person who receives compensation, directly or indirectly, and engages for all or part of her or his time, directly or indirectly, or through publications or writings, in the business of advising others as to the value of securities or as to the advisability of investments in, purchasing of, or selling of securities, except a dealer whose performance of these services is solely incidental to the conduct of her or his business as a dealer and who receives no special compensation for such services.
  - Does not include a “federal covered adviser.”<sup>8</sup>
- “Associated persons,” which include:<sup>9</sup>
  - With respect to a dealer or investment adviser, any of the following:
    - Any partner, officer, director, or branch manager of a dealer or investment adviser or any person occupying a similar status or performing similar functions;
    - Any natural person directly or indirectly controlling or controlled by such dealer or investment adviser, other than an employee whose function is only clerical or ministerial; or
    - Any natural person, other than a dealer, employed, appointed, or authorized by a dealer, investment adviser, or issuer to sell securities in any manner or act as an investment adviser as defined in s. 517.021, F.S.
  - With respect to a federal covered adviser, any person who is an investment adviser representative and who has a place of business in this state.

### *Vulnerability of Seniors to Investment Fraud*

Although investment fraud is not a new occurrence in the financial marketplace, recent economic forces have created an environment conducive to swindlers practicing their craft.<sup>10</sup> Such economic forces include:<sup>11</sup>

- The decline of traditional pensions, which has resulted in fewer Americans relying on expert money managers to invest their retirement funds in a fast-moving and complex investment market.
- The rise of technology, which has made it significantly easier for scammers to reach a broad set of investors with sophisticated robotic and predictive telephone dialing, email, television, and social media.
- The rise of the information age, which has given scammers unlimited access to personal information about investors, making it easier for them to customize their messages and harder for investors to discern who is truly on their side.

In recent years, financial research has focused on understanding the vulnerability of seniors to investment fraud. In a 2012 study prepared for the FINRA Investor Education Foundation, adults 65 and older were found to be more likely than those who are younger to receive solicitations in the mail and over the telephone.<sup>12</sup> Survey respondents age 65 and older were also more likely to be solicited for fraud, more likely to engage with potentially fraudulent financial opportunities, and more likely to have lost money.<sup>13</sup>

<sup>7</sup> S. 517.021(14)(a), F.S.

<sup>8</sup> S. 517.021(9), (14)(b)9., F.S. A federal covered adviser must be registered under federal law and must provide a notice-filing to OFR. Ss. 517.021 and 517.1201, F.S.

<sup>9</sup> S. 517.021(2), F.S.

<sup>10</sup> Doug Shadel and Karla Pak, *AARP Investment Fraud Vulnerability Study*, AARP (2017), [https://www.aarp.org/content/dam/aarp/research/surveys\\_statistics/econ/2017/investment-fraud-vulnerability.doi.10.26419%252Fres.00150.001.pdf](https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2017/investment-fraud-vulnerability.doi.10.26419%252Fres.00150.001.pdf) (last visited Jan. 10, 2020).

<sup>11</sup> *Id.*

<sup>12</sup> FINRA Investor Education Foundation, *Financial Fraud and Fraud Susceptibility in the United States: Research Report from a 2012 National Survey*, 11 (Sept. 2013), [https://www.finrafoundation.org/sites/finrafoundation/files/Financial-Fraud-And-Fraud-Susceptibility-In-The-United-States\\_0\\_0\\_0.pdf](https://www.finrafoundation.org/sites/finrafoundation/files/Financial-Fraud-And-Fraud-Susceptibility-In-The-United-States_0_0_0.pdf) (last visited Jan. 10, 2020).

<sup>13</sup> *Id.* at 17-18.

A more recent study sponsored by AARP sought to identify psychological, behavioral, and demographic risk factors that might make investors more vulnerable to investment fraud.<sup>14</sup> The study identified the following psychological risk factors:<sup>15</sup>

- Belief that accumulation of wealth is an important measure of success in life.
- Openness to new opportunities presented by salespersons.
- Belief that the most profitable investments are those not regulated by the government.
- Belief in taking chances with one's money if those chances are likely to pay off.

Many behavioral factors that put victims at risk flow directly from the psychological risk factors above.<sup>16</sup> The mindset of openness to sales pitches may result in signaling a desire to be pitched with investment opportunities.<sup>17</sup> Compared to the general investor population, more fraud victims engaged in active trading of five or more trades in a year, and the victims were more likely to make remote investments.<sup>18</sup> As for demographic risk factors, the study found that many more of the victims were older (age 70+), male, married, and veterans.<sup>19</sup>

In 2013, the Financial Crimes Enforcement Network (FinCEN), which receives and maintains the database of suspicious activity reports (SARs),<sup>20</sup> introduced electronic SAR filing with a designated category for "elder financial exploitation".<sup>21</sup> Recent analysis of SARs related to elder financial exploitation has revealed the following:

- Among the SARs that reported a loss to an older adult, the average amount lost was \$34,200; in 7 percent of these SARs, the loss exceeded \$100,000.<sup>22</sup>
- One-third of the individuals who lost money were ages 80 and older, and adults ages 70 to 79 had the highest average monetary loss (\$45,300).<sup>23</sup>
- Where an individual has incurred an actual loss, the amount of loss reflects substantial financial hardship for elders: The median suspicious activity amount from one sample of scam-related SARs was \$6,105, and for theft-related SARs it was \$15,964. These amounts represent 16 and 41 percent, respectively, of the median income of \$38,515 for households maintained by individuals 65 and over in 2015 (as reported by the U.S. Census Bureau).<sup>24</sup>
- The total number of SAR filings and total suspicious activity amounts increased 20 percent and 30 percent, respectively, each year during the period studied (October 2013 – August 2019).<sup>25</sup>

### *FINRA Rules Relating to Financial Exploitation of Seniors*

FINRA is an SRO regulated by the United States Security Exchange Commission. Most broker-dealers in the United States are members of FINRA. As members, such broker-dealers are subject to FINRA rules and examination by FINRA. In an effort to address financial exploitation of seniors, FINRA

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<sup>14</sup> Doug Shadel and Karla Pak, *supra* note 10, at 14.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 15.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 6 and 15.

<sup>20</sup> A SAR "is a document that financial institutions, and those associated with their business, must file with the Financial Crimes Enforcement Network (FinCEN) whenever there is a suspected case of money laundering or fraud. These reports are tools to help monitor any activity within finance-related industries that is deemed out of the ordinary, a precursor of illegal activity, or might threaten public safety." Thomson Reuters, *What is a suspicious activity report?*, <https://legal.thomsonreuters.com/en/insights/articles/what-is-a-suspicious-activity-report> (last visited Jan. 10, 2020).

<sup>21</sup> Consumer Financial Protection Bureau, *Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends*, 3 (Feb. 2019), [https://files.consumerfinance.gov/f/documents/cfpb\\_suspicious-activity-reports-elder-financial-exploitation\\_report.pdf](https://files.consumerfinance.gov/f/documents/cfpb_suspicious-activity-reports-elder-financial-exploitation_report.pdf) (last visited Jan. 10, 2020).

<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.*

<sup>24</sup> FinCen, *Financial Trend Analysis: Elders Face Increased Financial Threat from Domestic and Foreign Actors*, 7 (Dec. 2019), [https://www.fincen.gov/sites/default/files/shared/FinCEN%20Financial%20Trend%20Analysis%20Elders\\_FINAL%20508.pdf](https://www.fincen.gov/sites/default/files/shared/FinCEN%20Financial%20Trend%20Analysis%20Elders_FINAL%20508.pdf) (last visited Jan. 10, 2020).

<sup>25</sup> *Id.* at 1.

implemented rules to provide its members with a way to respond to situations in which they have a reasonable basis to believe that financial exploitation of a “specified adult” has occurred, is occurring, has been attempted, or will be attempted.<sup>26</sup>

FINRA defines “specified adult” and “financial exploitation” as follows:

- “Specified adult” is a natural person age 65 and older; or . . . a natural person age 18 and older who the [FINRA] member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.<sup>27</sup>
- “Financial exploitation” means:
  - The wrongful or unauthorized taking, withholding, appropriation, or use of a specified adult’s funds or securities; or
  - Any act or omission by a person, including through the use of a power of attorney, guardianship, or any other authority regarding a specified adult, to:
    - Obtain control, through deception, intimidation or undue influence, over the specified adult’s money, assets, or property; or
    - Convert the specified adult’s money, assets, or property.<sup>28</sup>

Under the new rules, FINRA members have the ability to contact a customer’s designated trusted contact person and, when appropriate, place a temporary hold on a disbursement of funds or securities from a customer’s account.<sup>29</sup> The temporary hold expires after 15 business days, but the FINRA member may extend the hold by up to an additional 10 business days if the member’s internal review of facts and circumstances supports its reasonable belief that the financial exploitation has occurred, is occurring, has been attempted, or will be attempted.<sup>30</sup>

These rules took effect February 5, 2018.<sup>31</sup> However, they do not apply to broker-dealers and investment advisers who are not FINRA members.

#### *Mandatory Reporting for Abuse or Exploitation of Vulnerable Adults*

The Florida Department of Children and Families (DCF) houses the Adult Protective Services Program (APS). APS is responsible for preventing further harm to vulnerable adults who are victims of abuse, neglect, exploitation, or self-neglect.<sup>32</sup> Florida law currently contains a mandatory reporting requirement in ch. 415, F.S., the Adult Protective Services Act (APS Act), which states that any person “who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited shall immediately report such knowledge or suspicion to the Florida Abuse Hotline.”<sup>33</sup>

The APS Act defines “vulnerable adult” and “exploitation” as follows:

- “Vulnerable adult” is a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging.<sup>34</sup>

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<sup>26</sup> FINRA, *Regulatory Notice 17-11 (Financial Exploitation of Seniors)* (Mar. 2017), <https://www.finra.org/sites/default/files/Regulatory-Notice-17-11.pdf> (last visited Jan. 10, 2020).

<sup>27</sup> FINRA, *Rule 2165. Financial Exploitation of Specified Adults*, <https://www.finra.org/rules-guidance/rulebooks/finra-rules/2165> (last visited Jan. 10, 2020).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Florida Department of Children and Families, *Adult Protective Services: Protecting Vulnerable Adults*, <https://www.myflfamilies.com/service-programs/adult-protective-services/protecting-vulnerable-adults.shtml> (last visited Jan. 10, 2020).

<sup>33</sup> S. 415.1034(1)(a), F.S.; Florida Department of Children and Families, *Abuse Hotline: Report Abuse Online*, <https://www.myflfamilies.com/service-programs/abuse-hotline/report-online.shtml> (last visited Jan. 10, 2020).

<sup>34</sup> S. 415.102(28), F.S.

- “Exploitation” means a person who:<sup>35</sup>
  - Stands in a position of trust and confidence with a vulnerable adult and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult’s funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult; or
  - Knows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, the vulnerable adult’s funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.
- “Exploitation” may include, but is not limited to:<sup>36</sup>
  - Breaches of fiduciary relationships, such as the misuse of a power of attorney or the abuse of guardianship duties, resulting in the unauthorized appropriation, sale, or transfer of property;
  - Unauthorized taking of personal assets;
  - Misappropriation, misuse, or transfer of moneys belonging to a vulnerable adult from a personal or joint account; or
  - Intentional or negligent failure to effectively use a vulnerable adult’s income and assets for the necessities required for that person’s support and maintenance.

The Florida Abuse Hotline screens allegations of child and adult abuse and neglect to determine whether the information meets the criteria of an abuse report.<sup>37</sup> If the criteria is met, a protective investigation is initiated to confirm whether or not there is evidence that abuse, neglect, or exploitation occurred; whether there is an immediate or long-term risk to the victim; and whether the victim needs additional services to safeguard his or her well-being.<sup>38</sup> APS services include:<sup>39</sup>

- On-site investigation of reports of alleged abuse, neglect, exploitation or self-neglect;
- Determination of immediate risk to the victim and provision of necessary emergency services;
- Evaluation of the need for and provision of protective supervision; and,
- Provision of on-going protective services.

A person who participates in making a report to the Florida Abuse Hotline or who participates in a judicial proceeding resulting therefrom “is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from any liability, civil or criminal, that otherwise might be incurred or imposed.”<sup>40</sup>

## Effect of the Bill

The bill allows a dealer or investment adviser to delay a transaction on, or a disbursement of funds or securities from, an account of a specified adult or an account for which a specified adult is a beneficiary or beneficial owner if the dealer or investment adviser reasonably believes that financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted in connection with the transaction or disbursement. The dealer’s or investment adviser’s reasonable belief may be based on the facts and circumstances observed in such dealer’s or investment adviser’s, or an associated person’s, business relationship with the specified adult.

A “specified adult” is an individual who is age 65 or older or who meets the definition of “vulnerable adult” under the APS Act.

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<sup>35</sup> S. 415.102(8), F.S.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> S. 415.1036(1), F.S.

The bill defines “exploitation” to mean:

- The wrongful or unauthorized taking, withholding, appropriation, or use of money, assets, or property of a specified adult, or any act or omission by a person, including through the use of a power of attorney, guardianship, or conservatorship of a specified adult, to:
  - Obtain control over the specified adult’s money, assets, or property through deception, intimidation, or undue influence to deprive him or her of the ownership, use, benefit, or possession of his or her money, assets, or property; or
  - Convert the specified adult’s money, assets, or property to deprive him or her of the ownership, use, benefit, or possession of his or her money, assets, or property.

The bill adds dealers, investment advisers, and associated persons to the list of specified mandatory reporters under the APS Act. If the exploitation involves a specified adult who meets the definition of a “vulnerable adult” under the APS Act, the dealer, investment adviser, or associated person must immediately notify DCF, via the Florida Abuse Hotline.<sup>41</sup> The bill allows DCF to share the status or result of an investigation with the reporting dealer or investment adviser.

Additionally, within three business days after placing a delay, the dealer or investment adviser must:

- Provide written notice, which may be transmitted electronically, to all parties authorized to transact business on the account as well as any designated trusted contact,<sup>42</sup> using the contact information provided for the account, of the delay and the reason for the delay, unless the dealer or investment adviser reasonably believes that any such party has engaged in, is engaging in, has attempted to engage in, or will attempt to engage in the suspected exploitation of the specified adult.
- Notify OFR either by telephone or in writing, which may be transmitted electronically, of the delay and the reason for the delay.

A delay expires 15 business days after the date on which the delay was placed. The dealer or investment adviser may extend the delay for up to 10 business days if its review of available facts and circumstances continues to support its reasonable belief that exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted. Within three business days after an extension, the dealer or investment adviser must notify OFR of the extension. The length of the delay may be shortened or extended at any time by a court of competent jurisdiction. The bill does not prevent a dealer or investment adviser from terminating a delay after communication with the parties authorized to transact business on the account and any trusted contact on the account.

A dealer or investment adviser subject to the jurisdiction of OFR must make available to OFR, upon request, all records relating to a delay or notification made by the dealer or investment adviser.

Before placing a delay on a transaction or disbursement, a dealer or investment adviser must have training policies or programs reasonably designed to educate associated persons on issues pertaining to exploitation, must develop and maintain written procedures regarding the manner in which suspected exploitation is required to be reported to the supervisory personnel, when applicable, and must conduct periodic training for all associated persons. The dealer or investment adviser must maintain a written record of compliance with these training requirements.

Any dealer, investment adviser, or associated person who delays or participates in the delay of a transaction or disbursement, who provides records to an agency of competent jurisdiction, or who participates in a judicial or arbitration proceeding resulting therefrom is presumed to be acting based

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<sup>41</sup> Chapter 415, F.S., does not require a person to report suspected exploitation of an adult age 65 or older who does not meet the definition of “vulnerable adult”.

<sup>42</sup> The bill defines “trusted contact” to mean “a natural person 18 years of age or older whom the account owner has expressly identified and is recorded in a dealer’s or investment adviser’s books and records as a person who may be contacted about the account.”

upon a reasonable belief of exploitation and is immune from any civil or administrative liability that otherwise might be incurred or imposed, unless lack of such reasonable belief is shown by a preponderance of the evidence. The bill does not create new rights or obligations of a dealer, investment adviser, or associated person under other applicable laws or rules. In addition, the bill does not limit the right of a dealer, investment adviser, or associated person to otherwise refuse or place a delay on a transaction or disbursement under other applicable laws or rules or under an applicable customer agreement. Absent a reasonable belief of exploitation, the bill does not alter a dealer's, investment adviser's, or associated person's obligation to comply with instructions from a client to close an account or transfer an account to another dealer, investment adviser, or associated person.

**B. SECTION DIRECTORY:**

**Section 1.** Amends s. 415.1034, F.S., relating to mandatory reporting of abuse, neglect, or exploitation of vulnerable adults; mandatory reports of death.

**Section 2.** Creates s. 517.34, F.S., relating to protection of specified adults.

**Section 3.** Provides an effective date of July 1, 2020.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

The fiscal impact to OFR is indeterminate and depends on the number of reports of delays or extensions received from OFR licensees.<sup>43</sup> In the event that OFR receives a large number of reports, OFR may need an additional FTE employee in the future to accommodate the new workload.<sup>44</sup> OFR would also incur insignificant costs associated with rulemaking, which can be absorbed within its current budget.<sup>45</sup> There is no fiscal impact to DCF because current law already mandates that any person report suspected abuse, neglect, or exploitation of vulnerable adults to the Florida Abuse Hotline; and investigation of such allegation is already a mandated function for the agency.<sup>46</sup>

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

As permitted by the bill, the placement of a delay on a transaction or disbursement, may decrease losses to investors who are financially preyed upon because such a delay may prevent the money from ever getting into the hands of the bad actor. Once the bad actor receives the money, it is difficult, or in

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<sup>43</sup> Email from Alex Anderson, Director of Governmental Relations for OFR, Fiscal impact HB 813 (Jan. 10, 2020).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Florida Department of Children and Families, Agency Analysis of 2020 House Bill 813 (Jan 6, 2020).

some cases impossible, to ever recover the money. Given the inability to quantify avoidance of future losses to investors, the impact on the private sector is indeterminate.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not mandate rulemaking. However, ch. 517, F.S., provides the Financial Services Commission<sup>47</sup> authority to “adopt rules . . . to implement the provisions of [the chapter] conferring powers or duties upon [OFR], including, without limitation, adopting rules and forms governing reports.” S. 517.03(1), F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

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<sup>47</sup> The Financial Services Commission (commission) is composed of the Governor, Attorney General, Chief Financial Officer, and Commissioner of Agriculture. S. 20.121(3), F.S. The commission members are OFR’s agency head for the purpose of rulemaking. S. 20.121(3)(c), F.S.



26 jurisdiction; providing that delays may be terminated  
 27 by dealers or investment advisers under certain  
 28 circumstances; requiring that certain records be made  
 29 available to the office; providing immunity from civil  
 30 and administrative liability for dealers, investment  
 31 advisers, and associated persons for certain actions  
 32 based on a reasonable belief of exploitation;  
 33 requiring dealers and investment advisers to develop  
 34 and conduct periodic training for associated persons  
 35 and maintain written records of compliance with such  
 36 requirement; providing construction; providing an  
 37 effective date.

38

39 Be It Enacted by the Legislature of the State of Florida:

40

41 Section 1. Paragraph (a) of subsection (1) of section  
 42 415.1034, Florida Statutes, is amended to read:

43 415.1034 Mandatory reporting of abuse, neglect, or  
 44 exploitation of vulnerable adults; mandatory reports of death.—

45 (1) MANDATORY REPORTING.—

46 (a) Any person, including, but not limited to, any:

47 1. Physician, osteopathic physician, medical examiner,  
 48 chiropractic physician, nurse, paramedic, emergency medical  
 49 technician, or hospital personnel engaged in the admission,  
 50 examination, care, or treatment of vulnerable adults;

51           2. Health professional or mental health professional other  
52 than one listed in subparagraph 1.;

53           3. Practitioner who relies solely on spiritual means for  
54 healing;

55           4. Nursing home staff; assisted living facility staff;  
56 adult day care center staff; adult family-care home staff;  
57 social worker; or other professional adult care, residential, or  
58 institutional staff;

59           5. State, county, or municipal criminal justice employee  
60 or law enforcement officer;

61           6. Employee of the Department of Business and Professional  
62 Regulation conducting inspections of public lodging  
63 establishments under s. 509.032;

64           7. Florida advocacy council or Disability Rights Florida  
65 member or a representative of the State Long-Term Care Ombudsman  
66 Program; ~~or~~

67           8. Bank, savings and loan, or credit union officer,  
68 trustee, or employee; or

69           9. Dealer, investment adviser, or associated person under  
70 chapter 517,

71  
72 who knows, or has reasonable cause to suspect, that a vulnerable  
73 adult has been or is being abused, neglected, or exploited must  
74 ~~shall~~ immediately report such knowledge or suspicion to the  
75 central abuse hotline.

76 Section 2. Section 517.34, Florida Statutes, is created to  
 77 read:

78 517.34 Protection of specified adults.-

79 (1) As used in this section, the term:

80 (a) "Exploitation" means the wrongful or unauthorized  
 81 taking, withholding, appropriation, or use of money, assets, or  
 82 property of a specified adult, or any act or omission by a  
 83 person, including through the use of a power of attorney,  
 84 guardianship, or conservatorship of a specified adult, to:

85 1. Obtain control over the specified adult's money,  
 86 assets, or property through deception, intimidation, or undue  
 87 influence to deprive him or her of the ownership, use, benefit,  
 88 or possession of his or her money, assets, or property; or

89 2. Convert the specified adult's money, assets, or  
 90 property to deprive him or her of the ownership, use, benefit,  
 91 or possession of his or her money, assets, or property.

92 (b) "Specified adult" means a natural person 65 years of  
 93 age or older or a vulnerable adult as defined in s. 415.102.

94 (c) "Trusted contact" means a natural person 18 years of  
 95 age or older whom the account owner has expressly identified and  
 96 is recorded in a dealer's or investment adviser's books and  
 97 records as the person who may be contacted about the account.

98 (2) A dealer or investment adviser may delay a transaction  
 99 on, or a disbursement of funds or securities from, an account of  
 100 a specified adult or an account for which a specified adult is a

101 beneficiary or beneficial owner if the dealer or investment  
 102 adviser reasonably believes that exploitation of the specified  
 103 adult has occurred, is occurring, has been attempted, or will be  
 104 attempted in connection with the transaction or disbursement.

105 (a) The dealer's or investment adviser's reasonable belief  
 106 of exploitation may be based on the facts and circumstances  
 107 observed in such dealer's or investment adviser's, or an  
 108 associated person's, business relationship with the specified  
 109 adult.

110 (b)1. Within 3 business days after the date on which the  
 111 delay was first placed, the dealer or investment adviser must  
 112 provide written notice, which may be transmitted electronically,  
 113 to all parties authorized to transact business on the account  
 114 and any trusted contact on the account, using the contact  
 115 information provided for the account, of the delay and the  
 116 reason for the delay, unless the dealer or investment adviser  
 117 reasonably believes that any such party has engaged in, is  
 118 engaging in, has attempted to engage in, or will attempt to  
 119 engage in the suspected exploitation of the specified adult.

120 2. Within 3 business days after the date on which the  
 121 delay was first placed, the dealer or investment advisor must  
 122 notify the office by telephone using a number designated by the  
 123 office for such purpose, or in writing, which may be transmitted  
 124 electronically, of the delay and the reason for the delay.

125        3. Notwithstanding any law to the contrary, the Department  
 126 of Children and Families may provide the status or result of any  
 127 investigation to a dealer or investment adviser who has made a  
 128 report to the central abuse hotline pursuant to s. 415.1034.

129        (3) A delay on a transaction or disbursement under  
 130 subsection (2) expires 15 business days after the date on which  
 131 the delay was first placed. However, the dealer or investment  
 132 adviser may extend the delay for up to 10 additional business  
 133 days if the dealer's or investment adviser's review of the  
 134 available facts and circumstances continues to support such  
 135 dealer's or investment adviser's reasonable belief that  
 136 exploitation of the specified adult has occurred, is occurring,  
 137 has been attempted, or will be attempted. A dealer or investment  
 138 adviser who extends a delay shall notify the office within 3  
 139 business days after the date on which such extension begins  
 140 using the method specified in subparagraph (2)(b)2. The length  
 141 of the delay may be shortened or extended at any time by a court  
 142 of competent jurisdiction. This subsection does not prevent a  
 143 dealer or investment adviser from terminating a delay after  
 144 communication with the parties authorized to transact business  
 145 on the account and any trusted contact on the account.

146        (4) A dealer or investment adviser subject to the  
 147 jurisdiction of the office must make available to the office,  
 148 upon request, all records relating to a delay or notification

149 made by the dealer or investment adviser pursuant to this  
 150 section.

151 (5) A dealer, investment adviser, or associated person who  
 152 delays or participates in the delay of a transaction or  
 153 disbursement pursuant to this section, who provides records to  
 154 an agency of competent jurisdiction pursuant to this section, or  
 155 who participates in a judicial or arbitration proceeding  
 156 resulting therefrom is presumed to be acting based upon a  
 157 reasonable belief of exploitation and is immune from any civil  
 158 or administrative liability that otherwise might be incurred or  
 159 imposed, unless lack of such reasonable belief is shown by a  
 160 preponderance of the evidence. This subsection does not  
 161 supersede or diminish any immunity under chapter 415.

162 (6) (a) Before placing a delay on a transaction or  
 163 disbursement pursuant to this section, a dealer or investment  
 164 adviser must develop training policies or programs reasonably  
 165 designed to educate associated persons on issues pertaining to  
 166 exploitation, must develop and maintain written procedures  
 167 regarding the manner in which suspected exploitation is required  
 168 to be reported to supervisory personnel, when applicable, and  
 169 must conduct periodic training for all associated persons.

170 (b) The dealer or investment adviser must maintain a  
 171 written record of compliance with this subsection.

172 (7) This section does not create new rights or obligations  
 173 of a dealer, investment adviser, or associated person under

174 other applicable laws or rules. In addition, this section does  
 175 not limit the right of a dealer, investment adviser, or  
 176 associated person to otherwise refuse or place a delay on a  
 177 transaction or disbursement under other applicable laws or rules  
 178 or under an applicable customer agreement.

179 (8) Absent a reasonable belief of exploitation as provided  
 180 in this section, this section does not alter a dealer's,  
 181 investment adviser's, or associated person's obligation to  
 182 comply with instructions from a client to close an account or  
 183 transfer an account to another dealer, investment adviser, or  
 184 associated person.

185 Section 3. This act shall take effect July 1, 2020.

## **INSURANCE & BANKING SUBCOMMITTEE**

### **HB 813 by Rep. McClure Protection of Vulnerable Investors**

#### **AMENDMENT SUMMARY January 15, 2020**

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**Amendment 1 by Rep. McClure (Lines 76-184):** The amendment:

- Adds legislative findings and intent.
- Removes language that expressly states what facts and circumstances may form the basis of the dealer's or investment adviser's reasonable belief of financial exploitation.
- Requires the creation of a form by rule for the dealer or investment adviser to report a delay to the Office of Financial Regulation (OFR).
- Amends the required content of the report to OFR to require the name of the investment adviser and the date on which the delay was made, rather than the reason for the delay.
- Removes language that would have allowed the Department of Children and Families to provide the status or result of any investigation to the reporting dealer or investment adviser.
- Requires the dealer or investment adviser to immediately initiate an internal review of the facts and circumstances that formed the basis of the reasonable belief of financial exploitation.
- Specifies that the notification to OFR of any extension of the delay must contain the date on which the delay was originally made.
- Requires rulemaking related to records that the dealer or investment adviser must make available to the OFR upon request.
- Amends the provision that grants civil and administrative immunity to the dealer, investment adviser, or associated person for placing a delay on a disbursement or transaction.
- Requires dealers and investment advisers, before placing a hold, to:
  - Develop and conduct annual training for associated persons and maintain written records of compliance with such requirement; and
  - Develop, maintain, and enforce written procedures regarding the manner in which suspected financial exploitation is reviewed internally.
- Makes other technical changes.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	_____	(Y/N)
ADOPTED AS AMENDED	_____	(Y/N)
ADOPTED W/O OBJECTION	_____	(Y/N)
FAILED TO ADOPT	_____	(Y/N)
WITHDRAWN	_____	(Y/N)
OTHER		

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1 Committee/Subcommittee hearing bill: Insurance & Banking  
2 Subcommittee

3 Representative McClure offered the following:

**Amendment (with title amendment)**

6 Remove lines 76-184 and insert:

7 Section 2. Section 517.34, Florida Statutes, is created to  
8 read:

9 517.34 Protection of specified adults.-

10 (1) As used in this section, the term:

11 (a) "Financial exploitation" means the wrongful or  
12 unauthorized taking, withholding, appropriation, or use of  
13 money, assets, or property of a specified adult; or any act or  
14 omission by a person, including through the use of a power of  
15 attorney, guardianship, or conservatorship of a specified adult,  
16 to:

Amendment No. 1

17 1. Obtain control over the specified adult's money,  
18 assets, or property through deception, intimidation, or undue  
19 influence to deprive him or her of the ownership, use, benefit,  
20 or possession of the money, assets, or property; or

21 2. Convert the specified adult's money, assets, or  
22 property to deprive him or her of the ownership, use, benefit,  
23 or possession of the money, assets, or property.

24 (b) "Specified adult" means a natural person 65 years of  
25 age or older, or a vulnerable adult as defined in s. 415.102.

26 (c) "Trusted contact" means a natural person 18 years of  
27 age or older who the account owner has expressly identified and  
28 who is recorded in a dealer's or investment adviser's books and  
29 records as the person who may be contacted about the account.

30 (2) The Legislature finds that many persons in this state,  
31 because of age or disability, are at increased risk of financial  
32 exploitation and loss of their assets, funds, investments, and  
33 investment accounts. The Legislature further finds that senior  
34 investors in this state are at a statistically higher risk of  
35 being targeted for financial exploitation, regardless of  
36 diminished capacity or other disability, because of their  
37 accumulation of substantial assets and wealth compared to  
38 younger age groups. In enacting this section, the Legislature  
39 recognizes the freedom of specified adults to manage their  
40 assets, make investment choices, and spend their funds, and  
41 intends that such rights may not be infringed absent a

Amendment No. 1

42 reasonable belief of financial exploitation as provided in this  
43 section. The Legislature therefore intends to provide for the  
44 prevention of financial exploitation of such persons. The  
45 Legislature intends to encourage the constructive involvement of  
46 securities dealers, investment advisers, and associated persons  
47 who take action based upon the reasonable belief that specified  
48 adults with investment accounts have been or are the subject of  
49 financial exploitation, and to provide securities dealers,  
50 investment advisers, and associated persons immunity from  
51 liability for taking actions as authorized herein. The  
52 Legislature intends to balance the rights of specified adults to  
53 direct and control their assets, funds, and investments and  
54 exercise their constitutional rights consistent with due process  
55 with the need to provide securities dealers, investment  
56 advisers, and associated persons the ability to place narrow,  
57 time-limited restrictions on these rights in an effort to  
58 decrease specified adults' risk of loss due to abuse, neglect,  
59 or financial exploitation.

60 (3) A dealer or investment adviser may delay a  
61 disbursement or transaction of funds or securities from an  
62 account of a specified adult or an account for which a specified  
63 adult is a beneficiary or beneficial owner if all of the  
64 following apply:

65 (a) The dealer or investment adviser reasonably believes  
66 that financial exploitation of the specified adult has occurred,

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67 is occurring, has been attempted, or will be attempted in  
68 connection with the disbursement or transaction.

69 (b) Not later than 3 business days after the date on which  
70 the delay was first placed, the dealer or investment adviser  
71 notifies in writing all parties authorized to transact business  
72 on the account and any trusted contact on the account, using the  
73 contact information provided for the account, with the exception  
74 of any party the dealer or investment adviser reasonably  
75 believes has engaged in, is engaging in, has attempted to engage  
76 in, or will attempt to engage in the suspected financial  
77 exploitation of the specified adult. The notice, which may be  
78 provided electronically, must provide the reason for the delay.

79 (c) Not later than 3 business days after the date on which  
80 the delay was first placed, the dealer or investment adviser  
81 notifies the office of the delay by telephone using a number  
82 designated by the office for such purpose or electronically on a  
83 form prescribed by commission rule. The notice must identify the  
84 dealer or investment adviser that made the delay, the name of  
85 the person who authorized the delay, and the date on which the  
86 delay was made.

87 (d) The dealer or investment adviser immediately initiates  
88 an internal review of the facts and circumstances that caused  
89 the dealer or investment adviser to reasonably believe that the  
90 financial exploitation of the specified adult has occurred, is  
91 occurring, has been attempted, or will be attempted.

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92       (4) A delay on a disbursement or transaction under  
93 subsection (3) expires 15 business days after the date on which  
94 the delay was first placed. However, the dealer or investment  
95 adviser may extend the delay for up to 10 additional business  
96 days if the dealer's or investment adviser's review of the  
97 available facts and circumstances continues to support such  
98 dealer's or investment adviser's reasonable belief that  
99 financial exploitation of the specified adult has occurred, is  
100 occurring, has been attempted, or will be attempted. A dealer or  
101 investment adviser who extends a delay shall notify the office  
102 in accordance with paragraph (3)(c) not later than 3 business  
103 days after the date on which the extension was applied. The  
104 notice must identify the dealer or investment adviser that  
105 extended the delay and the date on which the delay was  
106 originally made. The length of the delay may be shortened or  
107 extended at any time by a court of competent jurisdiction. This  
108 subsection does not prevent a dealer or investment adviser from  
109 terminating a delay after communication with the parties  
110 authorized to transact business on the account and any trusted  
111 contact on the account.

112       (5) A dealer or investment adviser must make available to  
113 the office, upon request, all records relating to a delay made  
114 by the dealer or investment adviser pursuant to this section, as  
115 prescribed by commission rule.

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116 (6) A dealer, an investment adviser, or an associated  
117 person who in good faith and exercising reasonable care complies  
118 with this section is immune from any administrative or civil  
119 liability that might otherwise arise from such delay in a  
120 disbursement or transaction in accordance with this section.  
121 This subsection does not supersede or diminish any immunity  
122 granted under chapter 415.

123 (7) Before placing a delay on a disbursement or  
124 transaction pursuant to this section, a dealer or an investment  
125 adviser shall do all of the following:

126 (a) Develop training policies or programs reasonably  
127 designed to educate associated persons on issues pertaining to  
128 financial exploitation.

129 (b) Conduct training for all associated persons at least  
130 annually and maintain a written record of all trainings  
131 conducted.

132 (c) Develop, maintain, and enforce written procedures  
133 regarding the manner in which suspected financial exploitation  
134 is reviewed internally, including, if applicable, the manner in  
135 which suspected financial exploitation is required to be  
136 reported to supervisory personnel.

137 (8) Absent a reasonable belief of financial exploitation  
138 as provided in this section, this section does not alter a  
139 dealer's, an investment adviser's, or an associated person's  
140 obligation to comply with instructions from a client to buy or

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141 sell securities, disburse funds or transfer securities from an  
142 account, close an account, or transfer an account to another  
143 dealer, investment adviser, or associated person.

144 (9) This section does not create new rights for or impose  
145 new obligations on a dealer, an investment adviser, or an  
146 associated person under other applicable law. This section does  
147 not limit the right of a dealer, an investment adviser, or an  
148 associated person to otherwise refuse or place a delay on a  
149 disbursement or transaction under other applicable law or under  
150 an applicable customer agreement.

151 -----  
152 **T I T L E A M E N D M E N T**

153 Remove lines 9-36 and insert:

154 F.S.; providing definitions; providing legislative  
155 intent; authorizing dealers and investment advisers to  
156 delay certain disbursements or transactions based on a  
157 reasonable belief of financial exploitation of a  
158 specified adult; requiring a dealer or investment  
159 adviser to notify certain persons and the Office of  
160 Financial Regulation of such delays within a specified  
161 timeframe; requiring a dealer or investment adviser to  
162 review the basis for a reasonable belief of financial  
163 exploitation of a specified adult; specifying the  
164 expiration of such delays; authorizing a dealer or  
165 investment adviser to extend a delay under certain

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166 | circumstances; requiring a dealer or investment  
167 | adviser to notify the office within a specified  
168 | timeframe after such extension begins; providing that  
169 | the length of such delays may be shortened or extended  
170 | by a court of competent jurisdiction; providing that  
171 | delays may be terminated by dealers or investment  
172 | advisers under certain circumstances; requiring that  
173 | certain records be made available to the office;  
174 | providing immunity from administrative and civil  
175 | liability for dealers, investment advisers, and  
176 | associated persons who in good faith and exercising  
177 | reasonable care comply with s. 517.34, F.S.; requiring  
178 | dealers and investment advisers to develop and conduct  
179 | annual training for associated persons and maintain  
180 | written records of compliance with such requirement;  
181 | requiring dealers and investment advisers to review  
182 | suspected financial exploitation; providing  
183 | construction; providing an



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 6033 Rental Agreements upon Foreclosure

**SPONSOR(S):** Sirois

**TIED BILLS:** IDEN./SIM. **BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N	Mawn	Luczynski
2) Insurance & Banking Subcommittee		Hinshelwood	Cooper
3) Judiciary Committee			

### SUMMARY ANALYSIS

A mortgage foreclosure is a civil action brought by a mortgage lender against a borrower in state court to force the sale of real property securing a mortgage loan when the borrower defaults on his or her loan obligation.

During the 2007-2008 financial crisis, lending practices, falling home prices, and high unemployment rates led to a high number of foreclosures across the United States. The impact was not limited to borrowers; one in five properties in foreclosure was a rental property, and roughly 40 percent of families facing eviction due to foreclosure were tenants. Prior to 2009, tenant protection at foreclosure varied by state, generally providing tenants few, if any, protections. However, on May 20, 2009, the President signed into law the Federal Protecting Tenants at Foreclosure Act ("PTFA") to provide bona fide tenants basic rights in residential property foreclosure proceedings. Specifically, the PTFA required the successor in interest at foreclosure to:

- Honor a tenant's lease until the end of the lease term; however, if the successor in interest at foreclosure were to sell the property to a purchaser who intended to occupy the unit as a primary residence, the lease could be terminated as of the date of sale so long as the tenant received at least 90 days' notice to vacate.
- Give a tenant at least 90 days' notice to vacate if there was either no lease or a lease terminable at will.
- Assume the housing assistance payments contract associated with an existing Section 8 lease.

The PTFA expired under a sunset clause on December 31, 2014, leaving state and local laws the sole source of tenant rights at foreclosure. To fill the void, s. 83.561, F.S., became law on June 2, 2015. This statute mirrors the PTFA in its application to the same types of properties, leases, tenants, and tenancies. However, Florida's statute differs from the PTFA in that a successor in interest at foreclosure does not have to honor an existing lease and may petition for a writ of possession only 30 days after serving the tenant with a lease termination notice.

On May 24, 2018, the President signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act, permanently restoring the PTFA in its original form. Because the restored PTFA provides greater protections for tenants at foreclosure than, and therefore conflicts with, s. 83.561, F.S., the PTFA preempts Florida's law. Thus, a successor in interest at foreclosure must adhere to the PTFA's standards.

HB 6033 repeals s. 83.561, F.S., as it conflicts with, and is therefore preempted by, the PTFA. The repeal clarifies the rights of Florida tenants and successors in interest at foreclosure, which may reduce litigation resulting from confusion over applicable law.

The bill will have no fiscal impact on state or local governments and will have an indeterminate impact on the private sector.

The bill provides an effective date of July 1, 2020.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h6033b.IBS.DOCX

DATE: 1/8/2020

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

##### Foreclosure

A mortgage foreclosure is a civil action brought by a mortgage lender<sup>1</sup> against a borrower in state court to force the sale of real property<sup>2</sup> securing a mortgage loan<sup>3</sup> when the borrower defaults<sup>4</sup> on his or her loan obligation. State law provides significant rights to borrowers facing foreclosure, including a right to service of the foreclosure complaint,<sup>5</sup> a right to respond to the suit,<sup>6</sup> and a right to a summary judgment hearing or a bench trial.<sup>7</sup>

During the 2007-2008 financial crisis, lending practices, falling home prices, and high unemployment rates led to a high number of foreclosures across the United States.<sup>8</sup> The impact was not limited to borrowers; one in five properties in foreclosure was a rental property, and roughly 40 percent of families facing eviction due to the foreclosure crisis were tenants.<sup>9</sup> Prior to 2009, tenant protection in foreclosure proceedings varied by state, generally giving tenants few, if any, protections.<sup>10</sup> In most states, a tenant could be legally required to move with only a few days' notice.<sup>11</sup>

##### Tenant Rights Legislation

##### *Federal Protecting Tenants at Foreclosure Act*

On May 20, 2009, President Barack Obama signed into law the Federal Protecting Tenants at Foreclosure Act ("PTFA") to provide bona fide tenants basic rights in foreclosure proceedings.<sup>12</sup> Specifically, the PTFA required the successor in interest at foreclosure<sup>13</sup> to:

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<sup>1</sup> A mortgage foreclosure may be brought by a person entitled to enforce a mortgage note, as defined in s. 673.3011, F.S. "The term 'person entitled to enforce' [a mortgage note] means: (1) The holder of the [mortgage note]; (2) A nonholder in possession of the [mortgage note] who has the rights of a holder; or (3) A person not in possession of the [mortgage note] who is entitled to enforce the [mortgage note] pursuant to s. 673.3091 or s. 673.4181(4). A person may be a person entitled to enforce the [mortgage note] even though the person is not the owner of the [mortgage note] or is in wrongful possession of the [mortgage note]." S. 673.3011, F.S. Depending on the circumstances, the person entitled to enforce the mortgage note may be the original lender, a servicer, or a holder in due course such as a subsequent purchaser of the note. *Id.*; Fla. R. Civ. P. 1.210(a) (commonly known as the real party in interest rule); *Rodriguez v. Wells Fargo Bank, N.A.*, 178 So. 3d 62, 63 (Fla. 4th DCA 2015) ("A servicer that is not the holder of the note may have standing to commence a foreclosure action on behalf of the real party in interest . . .").

<sup>2</sup> "Real property" means land, buildings, fixtures, and all other improvements to land. S. 192.001(12), F.S.

<sup>3</sup> "Mortgage loan" means "[a] loan secured by a mortgage . . . on real property." BLACK'S LAW DICTIONARY 955 (8th ed. 2004). "Mortgage" means "[a] lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulated terms." *Id.* at 1031.

<sup>4</sup> A borrower defaults when he or she breaches a term of his or her mortgage loan agreement. For example, a borrower defaults on his or her loan if he or she fails to make a scheduled mortgage payment. See "Default," Legal Information Institute, available at <https://www.law.cornell.edu/wex/default> (last visited Dec. 12, 2019).

<sup>5</sup> Fla. R. Civ. P. 1.070(j); Chs. 48 and 49, F.S.

<sup>6</sup> Fla. R. Civ. P. 1.500.

<sup>7</sup> Fla. R. Civ. P. 1.510(a); Ss. 45.031(2) and 702.01, F.S.

<sup>8</sup> Elayne Weiss, *Protecting Tenants at Foreclosure*, National Low Income Housing Coalition, available at [https://nlihc.org/sites/default/files/AG-2019/06-06\\_PTFA.pdf](https://nlihc.org/sites/default/files/AG-2019/06-06_PTFA.pdf) (last visited Dec. 12, 2019).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Protecting Tenants at Foreclosure Act of 2009, Pub. L. 111-22, 123 Stat. 1660.

- Honor a tenant's lease until the end of the lease term; however, if the successor in interest at foreclosure were to sell the property to a purchaser who intended to occupy the unit as a primary residence, the lease could be terminated as of the date of sale so long as the tenant received at least 90 days' notice to vacate.
- Give a tenant at least 90 days' notice to vacate if there was either no lease or a lease terminable at will.
- Assume the housing assistance payments contract associated with an existing Section 8<sup>14</sup> lease.<sup>15</sup>

The PTFA applied to foreclosures on residential properties, including single family homes and multi-unit properties.<sup>16</sup> Tenants with lease rights of any kind, including month-to-month leases or leases terminable at will, were protected as long as the tenancy existed on the date of the notice of foreclosure and the tenant:

- Occupied the premises under an arm's length transaction rental agreement;
- Did not have a rental agreement significantly below market value; and
- Was not the mortgagor<sup>17</sup> in the subject foreclosure or the mortgagor's child, spouse, or parent.<sup>18</sup>

Additionally, the PTFA preempted<sup>19</sup> conflicting state law but specifically provided that it did not affect "any [s]tate or local law that provides longer time periods or other additional protections for tenants."<sup>20</sup> However, the PTFA expired under a sunset clause<sup>21</sup> on December 31, 2014,<sup>22</sup> and though the 114th Congress considered legislation to make the PTFA permanent, no extension passed.<sup>23</sup> State and local law again became the sole source of tenant rights at foreclosure.<sup>24</sup>

### *Florida's Response*

On June 2, 2015, Governor Rick Scott signed into law HB 779, creating s. 83.561, F.S.<sup>25</sup> This statute filled the void left by the PTFA's expiration, mirroring the PTFA in its application to the same types of properties, leases, tenants, and tenancies. However, Florida's statute differs from the PTFA in that a successor in interest at foreclosure does not have to honor an existing lease and may petition for a writ of possession<sup>26</sup> 30 days after serving the tenant with a lease termination notice.

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<sup>13</sup> A successor in interest at foreclosure is the person or entity acquiring title to a foreclosed property at the end of the foreclosure action. It could be the mortgage lender or a person who purchased the property at foreclosure. See *Protecting Tenants at Foreclosure*, *supra* note 8.

<sup>14</sup> Section 8 of the United States Housing Act of 1937, Pub. L. 75-412, codified at 42 U.S.C. § 1437 *et seq.*

<sup>15</sup> See *supra* note 12.

<sup>16</sup> *Id.*

<sup>17</sup> "Mortgagor" means "[o]ne who mortgages property; the mortgage-debtor, or borrower." BLACK'S LAW DICTIONARY 1034 (8th ed. 2004).

<sup>18</sup> See *supra* note 12.

<sup>19</sup> The United States Constitution's Supremacy Clause provides that federal law is "the supreme Law of the Land . . . , anything in the Constitution or Laws of any State to the contrary notwithstanding." From this concept springs the federal preemption doctrine, under which federal law preempts, or supplants, conflicting state laws. The United States Supreme Court identified two ways in which federal law preempts state law: expressly, when a federal law contains explicit preemptive language, and impliedly, when the federal law's structure and purpose contains implicit preemptive intent. See U.S. Const. art. VI., cl. 2.; see also *Glade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 132 (1963).

<sup>20</sup> See *supra* note 12.

<sup>21</sup> A law with a sunset clause automatically terminates unless expressly renewed. See "sunset law," Legal Information Institute, [https://www.law.cornell.edu/wex/sunset\\_law](https://www.law.cornell.edu/wex/sunset_law) (last visited Dec. 12, 2019).

<sup>22</sup> See *supra* note 12; Mortgage Reform and Anti-Predatory Lending Act, Pub. L. 111-203, 124 Stat. 2204.

<sup>23</sup> See *supra* note 8.

<sup>24</sup> *Id.*

<sup>25</sup> Ch. 2015-96, Laws of Fla.

<sup>26</sup> A writ of possession, issued by a clerk to the sheriff after entry of a judgment in favor of a landlord, describes the subject premises and commands the sheriff to put the landlord in possession of such premises after 24 hours' notice conspicuously posted thereon. S. 83.62, F.S.

## *PTFA Restoration*

On May 24, 2018, President Donald J. Trump signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act, permanently restoring the PTFA in its original form.<sup>27</sup> Because the restored PTFA provides greater protections for tenants at foreclosure than, and therefore conflicts with, s. 83.561, F.S., the PTFA preempts Florida's statute. Thus, a successor in interest at foreclosure must adhere to the PTFA's standards.

### **Effect of Proposed Changes**

HB 6033 repeals s. 83.561, F.S., as it conflicts with, and is therefore preempted by, the PTFA. The repeal clarifies the rights of Florida tenants and successors in interest at foreclosure, which may reduce litigation resulting from confusion over applicable law.

#### **B. SECTION DIRECTORY:**

**Section 1:** Repeals s. 83.561, F.S., relating to termination of rental agreement upon foreclosure.

**Section 2:** Provides an effective date of July 1, 2020.

## **II. 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 impact on the private sector is indeterminate. The PTFA currently applies to Florida tenants and successors in interest at foreclosure due to its preemption of s. 83.561, F.S. However, repealing this Florida statute may reduce litigation resulting from confusion over applicable law.

#### **D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

1  
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3  
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A bill to be entitled  
An act relating to rental agreements upon foreclosure;  
repealing s. 83.561, F.S., relating to the termination  
of rental agreements upon foreclosure of residential  
premises; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 83.561, Florida Statutes, is repealed.

Section 2. This act shall take effect July 1, 2020.