# Insurance & Banking Subcommittee

**Wednesday, December 13, 2023**
**10:30 AM - 12:30 PM**
**Morris Hall (17 HOB)**

## Meeting Packet

**Paul Renner**
**Speaker**

**Wyman Duggan**
**Chair**

# The Florida House of Representatives

**Commerce Committee**

**Insurance & Banking Subcommittee**

**Paul Renner**
**Speaker**

**Wyman Duggan**
**Chair**

# Meeting Agenda

Wednesday, December 13, 2023
10:30 am – 12:30 pm
Morris Hall (17 HOB)

I. Call to Order

II. Roll Call

III. Welcome and Opening Remarks

IV. Consideration of the following bill(s):

- HB 215 Risk Retention Groups by Truenow
- HB 585 Access to Financial Institution Customer Accounts by Rommel
- HB 587 Pub. Rec./Access to Financial Institution Customer Accounts by Rommel
- HB 623 Home Warranty Transfers by Steele

V. Closing Remarks

VI. Adjournment

303 House Office Building, 402 South Monroe Street, Tallahassee, FL 32399-1300
(850) 717-4870

**HB 215**

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 215 Risk Retention Groups
**SPONSOR(S):** Truenow
**TIED BILLS:** **IDEN./SIM. BILLS:**

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|---|---|---|
| 1) Insurance & Banking Subcommittee | | Fortenberry | Lloyd |
| 2) Commerce Committee | | | |

## SUMMARY ANALYSIS

A risk retention group (RRG) is a type of liability insurance company owned by its members. RRGs allow businesses with similar insurance needs to pool risks and form their own insurance companies under a combination of state and federal laws. Members of an RRG must be engaged in similar businesses or activities that have similar exposures due to the type of business, trade, product, service, premises, or operations. RRGs may only provide liability insurance; the law defines liability insurance as coverage for liability for damages to persons or property arising out of any business, trade, product, professional service, premises, operation, or activity of a state or local government.

RRGs must be domiciled in a state, but once licensed by the state of domicile, RRGs are permitted to insure members in all states. RRGs must complete a registration process in the non-domiciliary states in which they want to do business.

RRGs may operate in Florida if they obtain a certificate of authority as a liability insurer, or are licensed in another state and provide a copy of their business plan and annual financial statement to the Office of Insurance Regulation and designate the Chief Financial Officer as their agent for service of process.

Fronting is the use of a licensed, admitted insurer to issue an insurance policy on behalf of a self-insured organization or captive insurer without transferring any risk. The risk of loss under the policy remains with the self-insured entity or captive insurer, but the authorized insurer assumes a credit risk because it would be required to honor the policy if the insured fails to do so. This provides proof of coverage that is needed to satisfy financial responsibility laws when states require evidence of coverage written by an admitted insurer. Insurers typically charge between 5 and 10 percent of the premium being written in exchange for serving as fronting companies. Currently, an RRG cannot provide the coverage to its members in Florida that is required to satisfy motor vehicle financial responsibility laws. Therefore, it must utilize a fronting company.

The bill provides that RRGs authorized to do business in Florida are considered insurance companies authorized to do business in Florida. This statutory change would allow RRGs to provide coverage to their members, including that required to prove financial responsibility under Florida motor vehicle law, without having to utilize a fronting company.

The bill has no impact on local or state government revenues or expenditures. It has an indeterminate positive and negative direct economic impact on the private sector.

The bill is effective on July 1, 2024.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

**Background**

Risk Retention Groups

A risk retention group (RRG) is a type of liability insurance company owned by its members.[1] RRGs allow businesses with similar insurance needs to pool risks and form their own insurance companies under a combination of state and federal laws.[2] Members of an RRG must be engaged in similar businesses or activities that have similar exposures due to the type of business, trade, product, service, premises, or operations.[3]

RRGs may only provide liability insurance; the law defines liability insurance as coverage for liability for damages to persons or property arising out of any business, trade, product, professional service, premises, operation, or activity of a state or local government.[4] However, liability insurance does not include an employer's liability to its employees; thus, risk retention groups may not issue workers' compensation insurance policies to their members.[5]

Federal law treats risk retention groups differently than traditional insurance companies. Authorized insurers must be licensed in every state in which they operate and the domicile state serves as the primary regulator. In 1986, Congress passed the Liability Risk Retention Act (LRRA) to help businesses and other entities obtain liability insurance that had become either unaffordable or unavailable.[6] Under the LRRA, RRGs must be domiciled in a state, but once licensed by the state of domicile, RRGs are permitted to insure members in all states.[7] As a federal law, the LRRA preempts state regulation, and makes it easier for RRGs to do business throughout the country.[8] Those RRGs that were chartered prior to 1985 may operate under the laws of Bermuda or the Cayman Islands.[9]

Despite being governed by the LRRA, RRGs must complete a registration process in the non-domiciliary states in which they want to do business, and must designate those states' insurance commissioners as their agents for service of process for any legal proceedings originating in those states.[10] Additionally, RRGs must submit a plan of operation or feasibility study to the insurance commissioner of the domiciliary state before they may offer insurance in any state.[11] The plan or study must include the coverages, deductibles, coverage limits, rates and rating classification systems for each line of commercial liability insurance the RRG plans to cover.[12]

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[1] National Association of Insurance Commissioners (NAIC), *Risk Retention Groups*, https://content.naic.org/cipr-topics/risk-retention-groups (last visited Dec. 4, 2023).
[2] *Id.*
[3] 15 U.S.C. §3901(a)(4)(F) and s. 627.942(9)(f), F.S.
[4] 15 U.S.C. 3901(a)(2)(A) and s. 627.942(9)(g), F.S.
[5] 15 U.S.C. 3901(a)(2)(B) and s. 627.942(4), F.S.
[6] Captive Insurance Companies Association (CICA), *Risk Retention Resources*, https://www.cicaworld.com/risk-retention-resources/#:~:text=The%20Liability%20Risk%20Retention%20Act%20(LRRA)%20is%20a%20federal%20law,crisis%E2%80%9D%20in%20the%20United%20States (last visited Dec. 4, 2023). The LRRA consists of sections 15 U.S.C.§§ 3902-3906.
[7] *Id.*
[8] *Id.*
[9] 15 U.S.C. § 3901(a)(4) and s. 627.942(9), F.S.
[10] NAIC, *supra* note 1.
[11] *Id.*
[12] *Id.*

State regulators may also require RRGs to comply with state laws relating to claim settlement and false or fraudulent acts, pay premium taxes, and submit to financial exams if such exam has not been completed by the state in which the RRG is domiciled.[13]

States cannot require RRGs to participate in any insolvency guaranty association.[14] However, states may require notice that insurance provided by RRGs is not protected by an insolvency guaranty association.[15] Unlike authorized insurers, RRGs do not submit rate and form filings with a state regulator for approval. Instead, risk retention groups apportion risk among their members; thus, rates are based on an actuarial analysis of the membership and policies can be tailored to suit the needs of the membership.[16]

*Risk Retention Groups in Florida*

RRGs may operate in Florida if they obtain a certificate of authority as a liability insurer, or are licensed in another state and provide a copy of their business plan and annual financial statement to the Office of Insurance Regulation (OIR) and designate the Chief Financial Officer as their agent for service of process.[17] According to OIR, 146 risk retention groups are licensed in a state other than Florida and registered to do business in Florida.[18]

Domestic RRGs pay the same premium taxes as other domestic insurers.[19] Risk retention groups registered to operate in Florida but licensed in another state pay the same premium taxes as surplus lines insurers.[20] All risk retention groups operating in Florida must use agents who are licensed and appointed in Florida.[21]

Fronting Arrangements

The International Risk Management Institute (IRMI) describes "fronting" as the use of a licensed, admitted insurer to issue an insurance policy on behalf of a self-insured organization or captive insurer without transferring any risk.[22] The risk of loss under the policy remains with the self-insured entity or captive insurer, but the authorized insurer assumes a credit risk because it would be required to honor the policy if the insured fails to do so.[23] This provides proof of coverage that is needed to satisfy financial responsibility laws when states require evidence of coverage written by an admitted insurer.[24] Insurers typically charge between 5 and 10 percent of the premium being written in exchange for serving as fronting companies.[25]

The Florida Insurance Code (Code)[26] describes a fronting company as an authorized insurer which by reinsurance or otherwise generally transfers more than 50 percent to one unauthorized insurer, or more

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[13] 15 U.S.C. § 3902(a)(1).
[14] 15 U.S.C. § 3902(a)(2).
[15] 15 U.S.C. § 3902(a)(1).
[16] NAIC, *supra* note 1.
[17] *See* ss. 627.943 and 627.944, F.S.
[18] Florida Office of Insurance Regulation, *Active Company Search*, https://companysearch.myfloridacfo.gov/ (last visited Dec. 6, 2023).
[19] S. 627.943(4), F.S. Pursuant to s. 624.509, F.S., premium taxes (typically 1.75 percent of the premium) are collected by the licensed insurer and paid to the Department of Revenue on or before March 1 of each year. A domestic insurer is one formed under Florida law. S. 624.06(1), F.S.
[20] S. 627.944(3), F.S. Pursuant to s. 626.932, F.S., premium taxes (4.94 percent of the premium) are collected by the licensed insurance agent and paid to the Department of Financial Services on a quarterly basis; premiums are also reported to the Florida Surplus Lines Service Office (FSLSO) which oversees the reporting requirements of eligible surplus lines insurers.
[21] Ss. 627.943(5) and 627.944(12), F.S.
[22] IRMI, *fronting*, https://www.irmi.com/term/insurance-definitions/fronting (last visited Dec. 6, 2023).
[23] *Id.*
[24] *Id.* Chapter 324, F.S. sets forth the financial responsibility laws for owners and operators of motor vehicles, whether used for personal or commercial purposes.
[25] IRMI, *supra* note 22.
[26] Chapters 624-632, 634, 635, 636, 641, 642, 648, and 651, F.S., constitute the "Florida Insurance Code."

than 75 percent to two or more unauthorized insurers, of the entire risk of loss on all of the insurance written by it in Florida.[27] The unauthorized insurers that receive the risk do not meet the requirements to be an accredited or trusteed reinsurer in Florida.[28] Additionally, no authorized insurer is permitted to act as a fronting company for any unauthorized insurer which is not an approved reinsurer.[29]

Florida law explicitly prohibits:

- An authorized insurer or licensed motor vehicle service agreement company from acting as a fronting company for any unauthorized insurer or unlicensed motor vehicle service agreement company.[30]
- An authorized insurer or licensed home warranty association from acting as a fronting company for any unauthorized insurer or unlicensed home warranty association.[31]
- An authorized insurer or licensed service warranty association from acting as a fronting company for any unauthorized insurer or unlicensed service warranty association.[32]

The Code does not contemplate an authorized insurer acting as a fronting company for an RRG.

**Effect of the Bill**

The bill provides that RRGs authorized to do business in Florida are considered insurance companies authorized to do business in Florida. This statutory change would allow RRGs to provide directly coverage to their members, including those that are required to prove financial responsibility under Florida motor vehicle law, without having to utilize a fronting company.

B. SECTION DIRECTORY:

**Section 1.** Amends s. 627.944, F.S., relating to risk retention groups not certified in this state.

**Section 2.** Provides and effective date of July 1, 2024.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

[27] S. 624.404(4)(b), F.S. *See also* s. 624.410, F.S.
[28] *Id.*; *see also* s. 624.410, F.S.
[29] S. 624.404(4)(a), F.S.
[30] S. 634.241, F.S.
[31] S. 634.326, F.S.
[32] S. 634.429, F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will have a positive direct economic impact on private sector businesses that save money by receiving coverage from the RRGs of which they are a member instead of having to pay a fronting company. However, it will have a negative impact on insurers that have acted as fronting companies for the placement of coverage by RRGs.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. The 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

A bill to be entitled

An act relating to risk retention groups; amending s. 627.944, F.S.; providing that risk retention groups authorized to do business in this state are deemed to be insurance companies authorized to do business in this state; providing an effective date.

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

Section 1. Section 627.944, Florida Statutes, is amended to read:

627.944 Risk retention groups not certificated in this state.—Risk retention groups authorized to do business in this state pursuant to this section are deemed to be insurance companies authorized to do business in this state. Risk retention groups certificated or licensed in states other than this state and seeking to do business as a risk retention group in this state must observe and abide by the laws of this state as follows:

(1) NOTICE OF OPERATIONS AND DESIGNATION OF CHIEF FINANCIAL OFFICER AS AGENT.—Before offering insurance in this state, a risk retention group shall submit to the office:

(a) A statement identifying the state or states in which the risk retention group is certificated or licensed as a liability insurance company, date of certification or licensing,

its principal place of business, and such other information, including information on its membership, as the office may require to verify that the risk retention group is qualified as a risk retention group under the provisions of this part.

(b) A copy of its plan of operations or a feasibility study and revisions of such plan or study submitted to its state of domicile; provided, however, that the provision relating to the submission of a plan of operation or a feasibility study shall not apply with respect to any line or classification of liability insurance which was defined in the Product Liability Risk Retention Act of 1981 before October 27, 1986, and which was offered before such date by any risk retention group which had been certificated or licensed and operating for not less than 3 years before such date.

(c) A statement of registration which designates the Chief Financial Officer or her or his designee as its agent for the purpose of receiving service of legal documents of process.

(2) FINANCIAL CONDITION.—Any risk retention group doing business in this state shall submit to the office:

(a) A copy of the group's financial statement submitted to its state of domicile, which shall be certified by an independent public accountant and contain a statement of opinion on loss and loss adjustment expense reserves made by a member of the American Academy of Actuaries or a qualified loss reserve specialist under criteria established by rule of the commission

after considering any criteria established by the National Association of Insurance Commissioners.

(b) A copy of each examination of the risk retention group as certified by the insurance commissioner or public official conducting the examination.

(c) Upon request by the office, a copy of any audit performed with respect to the risk retention group.

(d) Such information as may be required to verify its continuing qualification as a risk retention group under the provisions of this part.

(3) TAXATION.—All premiums paid for insurance or coverages on risks located within this state to a risk retention group shall be subject to taxation at the same rate and subject to the same interest, fines, and penalties for nonpayment as that applicable to eligible surplus lines insurers. Each agent utilized in any transaction shall report and pay the taxes for the premiums for risks which they have placed with or on behalf of a risk retention group not certificated in this state. In the event that an agent fails to pay the tax, each risk retention group shall pay the tax for insured or covered risks located within this state. Further, each risk retention group shall report all premiums paid to it for insured or covered risks located within this state.

(4) COMPLIANCE WITH UNFAIR CLAIM SETTLEMENT PRACTICES LAW.—Any risk retention group, its agents, and its

representatives shall comply with the unfair claim settlement practices law of this state as set forth in s. 626.9541(1)(i).

(5) DECEPTIVE, FALSE, OR FRAUDULENT PRACTICES.—Any risk retention group shall comply with and be subject to the laws of this state regarding deceptive, false, or fraudulent acts or practices, including the provisions of part IX of chapter 626. If the office seeks an injunction regarding conduct in violation of these laws, the injunction may be obtained from any Florida court of competent jurisdiction.

(6) EXAMINATION REGARDING FINANCIAL CONDITION.—Any risk retention group must submit to an examination by the office to determine its financial condition if the insurance commissioner of the jurisdiction in which the group is certificated or licensed has not initiated an examination or does not initiate an examination within 30 days after a request by the office. Any examination shall be coordinated to avoid unjustified repetition and conducted in an expeditious manner.

(7) NOTICE TO PURCHASERS.—Any policy issued by a risk retention group shall contain in 10-point type on the front page and the declaration page, the following provision:

"Notice, this policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your state. State insurance insolvency guaranty funds are not available for your risk retention group."

(8) PROHIBITED ACTS REGARDING SOLICITATION OR SALE.—The following acts by a risk retention group are hereby prohibited:

(a) The solicitation or sale of insurance by a risk retention group to any person who is not eligible for membership in the group.

(b) The solicitation or sale of insurance by, or operation of, a risk retention group that is in a hazardous financial condition or is financially impaired.

(9) PROHIBITED OWNERSHIP BY AN INSURANCE COMPANY.—No risk retention group shall be allowed to do business in this state if an insurer is directly or indirectly a member or owner of the risk retention group, other than in the case of a risk retention group all of whose members are insurers.

(10) PROHIBITED COVERAGE.—No risk retention group may offer insurance coverage prohibited by the Florida Insurance Code or declared unlawful by the highest court of this state.

(11) DELINQUENCY PROCEEDINGS.—A risk retention group not domiciled in this state but doing business in this state shall comply with a lawful order issued in a voluntary dissolution proceeding or in a delinquency proceeding commenced by the office if there has been a finding of financial impairment after an examination under subsection (6).

(12) UTILIZATION OF AGENT.—A risk retention group shall utilize an agent licensed and appointed in this state in order to solicit, transact, underwrite, or provide insurance on a risk

of a group member, which risk is located in this state.

Section 2. This act shall take effect July 1, 2024.



CODING: Words ~~stricken~~ are deletions; words underlined are additions.

## INSURANCE & BANKING SUBCOMMITTEE

## HB 215 by Rep. Truenow
## Risk Retention Groups

## AMENDMENT SUMMARY
## December 13, 2023

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**Amendment 1 by Rep. Truenow (Strike-all):** The amendment:

- Provides that motor vehicle insurance coverage issued by risk retention groups operating under federal law, and registered to do business in the state, satisfies the financial responsibility requirements of state motor vehicle law.
- Preserves current law regarding risk retention groups within the Florida Insurance Code.

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 | | |

Committee/Subcommittee hearing bill: Insurance & Banking Subcommittee
Representative Truenow offered the following:

**Amendment (with title amendment)**

Remove everything after the enacting clause and insert:
Section 1. Subsection (8) of Section 324.021, Florida Statutes, is amended to read:

324.021 Definitions; minimum insurance required.—The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning:

(8) MOTOR VEHICLE LIABILITY POLICY.—Any owner's or operator's policy of liability insurance furnished as proof of financial responsibility pursuant to s. 324.031, insuring such

owner or operator against loss from liability for bodily injury, death, and property damage arising out of the ownership, maintenance, or use of a motor vehicle in not less than the limits described in subsection (7) and conforming to the requirements of s. 324.151, issued by any insurance company authorized to do business in this state, including but not limited to, a risk retention group operating in accordance with 15 U.S.C. § 3901 et seq. that conducts business in this state pursuant to s. 627.944. The owner, registrant, or operator of a motor vehicle is exempt from providing such proof of financial responsibility if he or she is a member of the United States Armed Forces and is called to or on active duty outside this state or the United States, or if the owner of the vehicle is the dependent spouse of such active duty member and is also residing with the active duty member at the place of posting of such member, and the vehicle is primarily maintained at such place of posting. The exemption provided by this subsection applies only as long as the member of the armed forces is on such active duty outside this state or the United States and the owner complies with the security requirements of the state of posting or any possession or territory of the United States.

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

Remove everything before the enacting clause and insert:
An act relating to risk retention groups; amending s. 324.021, F.S.; providing that motor vehicle insurance coverage issued by risk retention groups operating under federal law satisfies financial responsibility requirements under state motor vehicle law; providing an effective date.

# HB 585

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 585 Access to Financial Institution Customer Accounts
**SPONSOR(S):** Rommel
**TIED BILLS:** HB 587 **IDEN./SIM. BILLS:**

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|---|---|---|
| 1) Insurance & Banking Subcommittee | | Fletcher | Lloyd |
| 2) State Administration & Technology Appropriations Subcommittee | | | |
| 3) Commerce Committee | | | |

## SUMMARY ANALYSIS

The federal Bank Secrecy Act (BSA) establishes reporting, recordkeeping, and related requirements for federal and state-chartered financial institutions to help detect and prevent money laundering. Under the BSA, financial institutions are required to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities. These types of reports are known as "suspicious activity reports" (SARs) and are filed with the Financial Crimes Enforcement Network, a bureau of the U.S. Department of the Treasury.

Florida's codification of the BSA is the Florida Control of Money-Laundering and Terrorist Financing in Financial Institutions Act (Act). The Act requires financial institutions to submit to the Office of Financial Regulation (OFR) certain reports and maintain certain records of customers, accounts, and transactions involving currency or monetary instruments or suspicious activities in accordance with the policies of the BSA.

The bill requires financial institutions to file a report with OFR whenever the financial institution suspends, terminates, or takes similar action restricting access to a customer's or member's account because of suspicious activity.

In connection with the termination-of-access report, the bill also:

- Requires OFR to investigate the report to determine whether the financial institution's action was made in bad faith;
- Requires OFR to report a bad faith determination to the Department of Financial Services, the Attorney General, and the customer or member;
- Creates a private right of action for the recovery of damages against the financial institution if a bad faith determination is made, including award of attorney fees; and
- Provides that a qualified public depository's (QPD) bad faith suspension, termination, or similar action restricting account access is grounds for suspension or disqualification from the QPD program, as well as grounds for the Chief Financial Officer to impose an administrative penalty on the QPD in lieu of a suspension or disqualification.

The bill has no impact on state revenues or local government revenues and expenditures, but has an indeterminate negative impact on state expenditures and an indeterminate positive impact on the private sector.

The bill provides an effective date of July 1, 2024.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

**Background**

***Financial Institutions Codes***

Florida's Financial Institutions Codes are codified under Title XXXVIII of the Florida Statutes.[1] The Financial Institutions Codes apply to all state-authorized and state-chartered financial institutions and to the enforcement of all laws relating to state-authorized and state-chartered financial institutions.[2] A primary purpose of the Financial Institutions Codes is to provide for and promote the safe and sound conduct of the financial services industry in Florida.[3]

The specific chapters under the Financial Institutions Codes are:

- Ch. 655, F.S. – Financial Institutions Generally
- Ch. 657, F.S. – Credit Unions
- Ch. 658, F.S. – Banks and Trust Companies;
- Ch. 660, F.S. – Trust Business
- Ch. 662, F.S. – Family Trust Companies
- Ch. 663, F.S. – International Banking
- Ch. 665, F.S. – Associations
- Ch. 667, F.S. – Savings Banks

***Office of Financial Regulation***

The Office of Financial Regulation (OFR) is the regulatory authority for Florida's financial services industry.[4] OFR reports to the Financial Services Commission (Commission) which is made up of the Governor and the members of the Florida Cabinet: the Chief Financial Officer (CFO), Attorney General (AG), and Agriculture Commissioner.[5] OFR enforces and administers the Financial Institutions Codes; is responsible for supervising banks, credit unions, savings associations, and international bank agencies; and licenses and regulates non-depository finance companies and the securities industry.[6]

***Bank Secrecy Act***

The federal Bank Secrecy Act (BSA)[7] establishes reporting, recordkeeping, and related requirements for federal and state-chartered[8] financial institutions to help detect and prevent money laundering.[9] Specifically, the BSA and other anti-money laundering regulations (BSA/AML) require financial institutions to, among other things, keep records of cash purchases of negotiable instruments and file reports of cash transactions exceeding $10,000 (daily aggregate amount).[10]

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[1] S. 655.005(1)(k), F.S.
[2] S. 655.001(1), F.S.
[3] S. 655.001(2), F.S.
[4] Florida Office of Financial Regulation, *About Our Agency*, https://flofr.gov/sitePages/AboutOFR.htm (last visited Dec. 4, 2023).
[5] *Id.*
[6] Florida Department of Financial Services, *Financial Services Commission*, https://www.myfloridacfo.com/about/about-dfs/commission (last visited Dec. 4, 2023). *See also*, s. 655.012, F.S.
[7] 31 U.S.C. § 5311 et seq.
[8] *See*, 12 C.F.R. § 326.8 (sets forth requirements for state-chartered banks to establish and maintain procedures to ensure and monitor their compliance with the BSA). *See also*, 12 C.F.R. § 353 (establishes requirements for state-chartered banks to file a suspicious activity report under certain circumstances).
[9] U.S. Treasury Financial Crimes Enforcement Network, *FinCEN's Legal Authorities*, https://www.fincen.gov/resources/fincens-legal-authorities (last visited Dec. 6, 2023).
[10] *Id.*

Under the BSA/AML laws, financial institutions must also:

- establish effective BSA compliance programs;
- establish effective customer due diligence systems and monitoring programs;
- screen against Office of Foreign Assets Control lists and other government lists;
- establish an effective suspicious activity monitoring and reporting process; and
- develop risk-based anti-money laundering programs.[11]

The U.S. Office of the Comptroller of Currency regularly conducts examinations of national banks, federal branches, federal savings associations, and agencies of foreign banks in the U.S. to determine compliance with BSA/AML laws.[12]

SUSPICIOUS ACTIVITY REPORTS

In addition to the other requirements under the BSA/AML laws, financial institutions are also required to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities.[13] These types of reports are known as "suspicious activity reports" (SAR) and are filed with the Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Department of the Treasury, using FinCEN's BSA E-filing system.[14]

Under this requirement, a financial institution is required to file an SAR no later than 30 calendar days after the date of initial detection of facts that may constitute a basis for filing an SAR.[15] For instances where no suspect was identified on the date of the incident requiring the filing, a financial institution may delay filing an SAR for an additional 30 calendar days to identify a suspect.[16] However, in no case shall reporting be delayed more than 60 calendar days after the date of initial detection of a reportable transaction.[17]

***Florida Control of Money-Laundering and Terrorist Financing in Financial Institutions Act***

The purpose of the Florida Control of Money-Laundering and Terrorist Financing in Financial Institutions Act[18] (Act), s. 655.50, F.S., is to require submission to OFR of certain reports and the maintenance of certain records of customers, accounts, and transactions involving currency or monetary instruments or suspicious activities if:[19]

- such reports and records deter using financial institutions to conceal, move, or provide proceeds obtained from or intended for criminal or terrorist activities; or
- such reports and records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

The Act requires financial institutions to designate and retain a BSA/AML compliance officer, which is defined as an officer that is responsible for the development and implementation of the financial institution's policies and procedures for complying with the requirements of the Act and BSA/AML laws.[20] Any change in a financial institution's BSA/AML compliance officer must be reported to OFR.[21]

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[11] U.S. Office of the Comptroller of the Currency, *Bank Secrecy Act*, https://www.occ.treas.gov/topics/supervision-and-examination/bsa/index-bsa.html (last visited Dec. 5, 2023).
[12] *Id.*
[13] U.S. Treasury Financial Crimes Enforcement Network, *supra* note 9.
[14] U.S. Office of the Comptroller of the Currency, *Suspicious Activity Report Program*, https://www.occ.treas.gov/publications-and-resources/forms/sar-program/index-sar-program.html (last visited Dec. 5, 2023).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] S. 655.50, F.S.
[19] S. 655.50(2), F.S.
[20] S. 655.50(4), F.S.
[21] *Id.*

Additionally, the Act requires financial institutions to maintain:[22]

- full and complete records of all financial transactions, including all records required by the BSA/AML laws, for a minimum of 5 years;
- a copy of all reports filed with OFR as required under the Act for a minimum of 5 years after submission of the report; and
- a copy of all records of exemption for each qualified business customer[23] for a minimum of 5 calendar years after termination of exempt status of such customer.

The Act also requires financial institutions to keep a record of each financial transaction which involves currency or other monetary instrument that has a value greater than $10,000, involves the proceeds of specified unlawful activity, or is designed to evade the reporting requirements of the Act or other state or federal laws, or which the financial institution reasonably believes is suspicious activity.[24]

A financial institution, or officer, employee, or agent thereof, which files a report in good faith pursuant to the Act is not liable to any person for loss or damage caused in whole or in part by the making, filing, or governmental use of the report, or any information contained therein.[25]

OFR ENFORCEMENT

In addition to any other powers conferred by the Financial Institutions Codes, OFR may bring an action in court to enforce or administer the Act, as well as issue and serve upon any person an order of removal if OFR determines such person is violating, has violated, or is about to violate any provisions of the Act or any similar state or federal law.[26]

OFR may also impose and collect an administrative fine against any person found to have violated any provision of the Act or similar state or federal law in an amount up to $10,000 per day for each willful violation or $500 per day for each negligent violation.[27]

VIOLATIONS OF THE ACT

A person who willfully violates the Act commits a misdemeanor of the first degree,[28] unless the violation involves financial transactions of certain amounts, in which case the criminal penalties vary by first, second, and third-degree felonies depending on the amount and timing of such transactions. [29]
In addition to the criminal penalties, a person who violates the Act may be subject to a fine of up to $250,000 or twice the value of the financial transaction, whichever is greater, and a subsequent violation could result in a fine up to $500,000 or quintuple the value of the financial transaction, whichever is greater.[30]

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[22] S. 655.50(8), F.S.

[23] *See*, 31 U.S.C. § 5313(e), providing that the U.S. Secretary of Treasury (Secretary) may exempt a depository institution from BSA/AML reporting requirements for transactions between the institution and a "qualified business customer" (QBC) of the institution on the basis of information submitted to the Secretary. QBC is defined as a business that:

- maintains a transaction account at the depository institution;
- frequently engages in transactions with the institution which are subject to BSA/AML reporting requirements; and
- meets criteria which the Secretary determines is sufficient to ensure the purposes of the BSA/AML laws are carried out without requiring a report for such transactions.

[24] S. 655.50(5), F.S.

[25] S. 655.50(5)(c), F.S.

[26] Ss. 655.50(9)(a)-(c), F.S.

[27] S. 655.50(9)(d), F.S.

[28] S. 655.50(10)(a), F.S.

[29] S. 655.50(10)(b), F.S. *See also*, s. 775.082, F.S. A person who willfully violates or knowingly causes another to violate the Act and the violation involves financial transactions of certain amounts:

- financial transactions totaling or exceeding $300 but less than $20,000 in any 12-month period, commits a felony of the third degree;
- financial transactions totaling or exceeding $20,000 but less than $100,000 in any 12-month period, commits a felony of the second degree; or
- financial transactions totaling or exceeding $100,000 in any 12-month period, commits a felony of the first degree.

[30] S. 655.50(10)(c), F.S.

A person or financial institution who violates the Act may also be liable for a civil penalty of not more than the greater of the value of the financial transaction involved or $25,000.[31]

***Effects of Banks' Termination of Account Access***

In 2022, banks filed over 1.8 million SARs, which is a 50% increase in two years.[32] Multiple SARs often result in a financial institution terminating, suspending, or otherwise restricting a customer's account access.[33] A New York Times study of over 500 cases of financial institutions "dropping" their customers, including interviews with current and former bank industry staffers, revealed the negative effects of a bank's decision to remove a customer's account access:

> Individuals can't pay their bills on time. Banks often take weeks to send them their balances. While the institutions close their credit cards, their credit scores suffer. Upon cancellation, small businesses often struggle to make payroll – and must explain to vendors and partners that they don't have a bank account for the time being… [And] once customers have moved on, they don't know whether there is a black mark somewhere on their permanent records that will cause a repeat episode at another bank. If the bank has filed an SAR, it isn't legally allowed to tell you, and the federal government prosecutes only a small fraction of the people whom the banks document in their SARs.[34]

As a result, customers do not know why they were ever under suspicion.[35] Interviews with individuals who had lost access to their accounts revealed behaviors that may have caused their banks to "drop" them.[36] Specifically, a few of the interviews revealed the following:[37]

- Unusual Cash Deposits: When a bar owner's weekly cash deposits fell just below the federal currency reporting thresholds, the bank closed the bar's account and the personal checking and credit card accounts of the owner and his spouse.
- A Marijuana Connection: A married couple's accounts at a bank were shut down after the husband started receiving direct deposits from a cannabis company that had recently acquired his employer.
- Criminal History: A man who had served 5 years in prison for stealing a car from a dealership and using a counterfeit bill (among other crimes) had his accounts shut down at three different banks. His personal banker from the third bank hinted it was because of his criminal record.

[31] Ss. 655.50(10)(d)-(e), F.S.
[32] Ron Lieber and Tara Seigel Bernard, *Why Banks Are Suddenly Closing Down Customer Accounts*, Thomson Reuters (Nov. 5, 2023), https://www.nytimes.com/2023/11/05/business/banks-accounts-close-suddenly.html?unlocked_article_code=1.8Uw.udoQ.0cmUgCSuo6eS&smid=nytcore-android-share (last visited Dec. 5, 2023).
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*

### *Qualified Public Depositories*

Unless a specific exemption applies, state and local governments must deposit public funds in a bank or savings association that has been designated as a qualified public depository (QPD) under the Florida Security for Public Deposits Act (FSPD).[38]

To be designated as a QPD by the CFO, a bank, savings bank, or savings association must:

- Have a federal or state charter;
- Have authority to accept deposits in Florida;
- Have its principal place of business in Florida, or a branch office in Florida;
- Have deposit insurance pursuant to the Federal Deposit Insurance Act;[39]
- Have procedures and practices for accurate identification, classification, reporting, and collateralization of public deposits;
- Annually attest to the CFO that the QPD has not engaged in an "unsafe and unsound practice" by denying or cancelling services based on environmental, social, or governance factors, as required by s. 280.025, F.S.; and
- Meet all the requirements of ch. 280, F.S., relating to security for public deposits.[40]

Under the FSPD, a QPD may be suspended or disqualified or both if the CFO determines that the QPD has engaged in certain activities that are listed in s. 280.051, F.S.

Additionally, if the CFO finds that one or more grounds exist for the suspension or disqualification of a QPD, the CFO may, in lieu of suspension or disqualification, impose an administrative penalty upon the QPD.[41] Specifically, with respect to any knowing and willful violation by the QPD of a lawful order or rule, the CFO may impose a penalty not exceeding $1,000 for each violation.[42] Currently, only failure to timely file the attestation required under s. 280.025, F.S., is deemed a knowing and willful violation by a QPD.[43]

## Effect of the Bill

### *Termination-of-Access Reports*

The bill amends Florida's Financial Institutions Codes to require a financial institution that terminates, suspends, or takes similar action restricting a customer's or member's account to file a termination-of-access report with OFR, unless such termination, suspension, or similar action was due to:

- The customer or member initiating the access change themselves;
- A lack of activity in the account; or
- The property is presumed unclaimed pursuant to ch. 717, F.S.[44]

The bill provides that the termination-of-access report shall be filed at such time and must contain such information as the Commission requires by rule.

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[38] S. 280.01, F.S. The Florida Security for Public Deposits Act is codified under ch. 280, F.S.
[39] 12 U.S.C.A. Ch. 16.
[40] S. 280.02(26), F.S.
[41] S. 280.054(1), F.S.
[42] S. 280.054(1)(b), F.S.
[43] *Id.*
[44] Ch. 717, F.S. is the Florida Disposition of Unclaimed Property Act (FDUP Act). Unclaimed property is a financial asset that is unknown or lost, or has been left inactive, unclaimed, or abandoned by its owner. Under the FDUP Act, unclaimed property is held by business or government entities (known as "holders") for a set period of time, usually 5 years. If the holder is unable to locate the owner, re-establish contact, and return the asset, it is reported and remitted to the Florida Department of Financial Services' Division of Unclaimed Property. *See*, Florida Department of Financial Services, Division of Unclaimed Property, *About*, https://fltreasurehunt.gov/UP-Web/sitePages/About.jsp (last visited Dec. 5, 2023).

OFR INVESTIGATION AND DETERMINATION

Within 90 days after receipt of a termination-of-access report, OFR must investigate the financial institution's action and determine whether the action was taken in bad faith as substantiated by competent and substantial evidence that was known or should have been known to the financial institution at the time of the termination, suspension, or similar action.

Within 30 days after making a bad faith determination, OFR must report to the AG and the CFO such bad faith termination, suspension, or similar action. The report to the AG must describe the findings of the investigation, provide a summary of the evidence, and state whether the financial institution violated the Financial Institutions Codes. Upon sending the report to the AG, OFR must also send a copy of the report to the aggrieved customer or member by certified mail, return receipt requested.

The bill provides that a financial institution's termination, suspension, or similar action restricting a customer's or member's account access in bad faith (as determined by OFR), or a financial institution's failure to timely file a termination-of-access report altogether, constitutes a violation of Florida's Financial Institutions Codes and subjects the financial institution to the applicable sanctions and penalties provided therein.

The bill requires OFR to provide any filed termination-of-access report, and any information contained therein, to any federal, state, or local law enforcement or prosecutorial agency, and any federal or state agency responsible for the regulation or supervision of financial institutions, if the provision of such report is otherwise required by law.

PRIVATE CAUSE OF ACTION

The bill provides a private cause of action to the aggrieved customer or member against the financial institution that, pursuant to a finding by OFR, acted in bad faith in terminating, suspending, or taking similar action restricting account access. The aggrieved customer or member may recover damages in any court of competent jurisdiction, together with costs and reasonable attorney fees to be assessed by the court.

To recover damages, however, the customer or member must establish that, beyond a reasonable doubt, the financial institution acted in bad faith in terminating, suspending, or taking similar action restricting access to the customer's or member's account.

The bill provides that a customer's or member's failure to initiate a cause of action within 12 months of OFR making a bad faith determination shall bar recovery of any filed claims thereafter.

***Qualified Public Depositories***

The bill also amends the list of activities that are grounds for suspension or disqualification or both for a QPD. Specifically, the bill provides that a QPD who is found by OFR to have acted in bad faith when terminating, suspending, or taking similar action restricting a customer's or member's account, or who has failed to timely file a termination-of-access report altogether, is grounds for suspension or disqualification or both.

The bill provides that, with respect to administrative penalties imposed in lieu of suspension or disqualification, a QPD's bad faith termination, suspension, or similar action restricting a customer's or member's account access (as determined by OFR), or a QPD's failure to timely file a termination-of-access report altogether, are each deemed a knowing and willful violation by the QPD.

B. SECTION DIRECTORY:

**Section 1.** Amends s. 280.051, F.S., relating to grounds for suspension or disqualification of a qualified public depository.

**Section 2.** Amends s. 280.054, F.S., relating to administrative penalty in lieu of suspension or disqualification.

**Section 3.** Creates s. 655.49, F.S., relating to termination-of-access reports by financial institutions; investigations by the Office of Financial Regulation.

**Section 4.** Provides an effective date of July 1, 2024.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The bill may have an indeterminate negative impact on OFR given the investigatory obligations imposed upon OFR by the bill. See Fiscal Comments, below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate positive economic impact on the private sector. The bill may lead to fewer financial institutions suspending, terminating, or taking similar action restricting customers' or members' account access in bad faith.

D. FISCAL COMMENTS:

The bill could increase the workload of OFR, depending on how many termination-of-access reports are filed with OFR. It is currently unknown whether additional resources would be needed to address the additional workload.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Not applicable.

B. RULE-MAKING AUTHORITY:

The bill provides rule-making authority to the Commission. Specifically, the bill provides that the termination-of-access report required under the proposed s. 655.40, F.S., shall be filed at such time and must contain such information as the Commission requires by rule.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to access to financial institution customer accounts; amending s. 280.051, F.S.; providing additional grounds for qualified public depositories to be suspended and disqualified; amending s. 280.054, F.S.; providing additional acts deemed knowing and willful violations by qualified public depositors which are subject to certain penalties; creating s. 655.49, F.S.; requiring financial institutions that take actions to restrict customers' and members' account access to file termination-of-access reports with the Office of Financial Regulation; providing exceptions from the reporting requirements; requiring such reports to be filed at such time and to contain such information as required by the Financial Services Commission; providing duties of the Office of Financial Regulation; providing reporting requirements for the office; providing violations and penalties; authorizing the office to provide the reports and certain information to specified entities under certain circumstances; providing that the financial institutions' customers and members have a cause of action under certain circumstances; authorizing such customers and members to recover damages, together



CODING: Words ~~stricken~~ are deletions; words underlined are additions.

with costs and attorney fees; providing a time limit for initiating causes of action; providing an effective date.

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

Section 1. Subsection (16) is added to section 280.051, Florida Statutes, to read:

280.051 Grounds for suspension or disqualification of a qualified public depository.—A qualified public depository may be suspended or disqualified or both if the Chief Financial Officer determines that the qualified public depository has:

(16) Pursuant to a determination notice reported by the Office of Financial Regulation under s. 655.49, acted in bad faith when terminating, suspending, or taking similar action restricting a customer's or member's account, or failed to timely file a termination-of-access report with the office as required under s. 655.49.

Section 2. Paragraph (b) of subsection (1) of section 280.054, Florida Statutes, is amended to read:

280.054 Administrative penalty in lieu of suspension or disqualification.—

(1) If the Chief Financial Officer finds that one or more grounds exist for the suspension or disqualification of a qualified public depository, the Chief Financial Officer may, in

lieu of suspension or disqualification, impose an administrative penalty upon the qualified public depository.

(b) With respect to any knowing and willful violation of a lawful order or rule, the Chief Financial Officer may impose a penalty upon the qualified public depository in an amount not exceeding $1,000 for each violation. If restitution is due, the qualified public depository shall make restitution upon the order of the Chief Financial Officer and shall pay interest on such amount at the legal rate. Each day a violation continues constitutes a separate violation. Each of the following ~~Failure to timely file the attestation required under s. 280.025~~ is deemed a knowing and willful violation by the qualified public depository:

1. Failure to timely file the attestation required under s. 280.025.

2. Bad faith termination, suspension, or similar action restricting a customer's or member's account access, as determined by the Office of Financial Regulation pursuant to s. 655.49.

3. Failure to timely file a termination-of-access report required under s. 655.49.

Section 3. Section 655.49, Florida Statutes, is created to read:

655.49 Termination-of-access reports by financial institutions; investigations by the Office of Financial

Regulation.—

(1) A financial institution that terminates, suspends, or takes similar action restricting a customer's or member's account access must file a termination-of-access report with the Office of Financial Regulation, unless the termination, suspension, or similar action restricting access was due to:

(a) The customer or member initiating the access change;

(b) A lack of activity in the account; or

(c) The account is presumed unclaimed pursuant to chapter 717.

The termination-of-access report shall be filed at such time and must contain such information as the commission requires by rule.

(2) The Office of Financial Regulation must:

(a) Within 90 days after receipt of a termination-of-access report, investigate the financial institution's action and determine whether the action was taken in bad faith as substantiated by competent and substantial evidence that was known or should have been known to the financial institution at the time of the termination, suspension, or similar action; and

(b) Within 30 days after making the determination required under paragraph (a), report to the Attorney General and the Chief Financial Officer a determination of a bad faith termination, suspension, or similar action restricting a

customer's or member's account access. The report to the Attorney General must describe the findings of the investigation, provide a summary of the evidence, and state whether an alleged violation of the financial institutions codes by the financial institution occurred. Upon sending the report to the Attorney General pursuant to this paragraph, the office must send a copy of the report to the customer or member by certified mail, return receipt requested.

(3) A financial institution's termination, suspension, or similar action restricting a customer's or member's account access, or a financial institution's failure to timely file a termination-of-access report as required under subsection (1), constitutes a violation of the financial institutions codes and subjects the financial institution to the applicable sanctions and penalties provided for in the financial institutions codes.

(4) The office shall provide any report filed pursuant to this section, or information contained therein, to any federal, state, or local law enforcement or prosecutorial agency, and any federal or state agency responsible for the regulation or supervision of financial institutions, if the provision of such report is otherwise required by law.

(5) If the office determines that a financial institution has acted in bad faith pursuant to subsection (2), the aggrieved customer or member of the financial institution has a cause of action against such financial institution for damages and may

recover damages therefor in any court of competent jurisdiction, together with costs and reasonable attorney fees to be assessed by the court. To recover damages under this subsection, the customer or member must establish that, beyond a reasonable doubt, the financial institution acted in bad faith in terminating, suspending, or taking similar action restricting access to the customer's or member's account. A customer's or member's failure to initiate a cause of action under this subsection within 12 months after the office's finding of bad faith pursuant to subsection (2) shall bar recovery of any filed claims thereafter.

Section 4. This act shall take effect July 1, 2024.



CODING: Words stricken are deletions; words underlined are additions.

## INSURANCE & BANKING SUBCOMMITTEE

## HB 585 by Rep. Rommel
## Relating to Access to Financial Institution Customer Accounts

## AMENDMENT SUMMARY
## December 13, 2023

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**Amendment 1 by Rep. Rommel (Line 80):** The amendment:

- Clarifies that a financial institution's bad faith termination, suspension, or other action restricting account access is a violation of the financial institutions codes.

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 | _____ |

Committee/Subcommittee hearing bill: Insurance & Banking Subcommittee

Representative Rommel offered the following:

**Amendment**

Remove lines 80-111 and insert:

office, unless the termination, suspension, or similar action restricting access was due to:

(a) The customer or member initiating the access change;

(b) A lack of activity in the account; or

(c) The account is presumed unclaimed pursuant to chapter 717.

The termination-of-access report shall be filed at such time and must contain such information as the commission requires by rule.

(2) The office must:

(a) Within 90 days after receipt of a termination-of-access report, investigate the financial institution's action and determine whether the action was taken in bad faith as substantiated by competent and substantial evidence that was known or should have been known to the financial institution at the time of the termination, suspension, or similar action; and

(b) Within 30 days after making the determination required under paragraph (a), report to the Attorney General and the Chief Financial Officer a determination of a bad faith termination, suspension, or similar action restricting a customer's or member's account access. The report to the Attorney General must describe the findings of the investigation, provide a summary of the evidence, and state whether an alleged violation of the financial institutions codes by the financial institution occurred. Upon sending the report to the Attorney General pursuant to this paragraph, the office must send a copy of the report to the customer or member by certified mail, return receipt requested.

(3) A financial institution's bad faith termination, suspension, or similar action restricting a customer's or member's account access, as determined by the office pursuant to subsection (2), or a financial institution’s failure to timely file a

# HB 587

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 587 Pub. Rec./Access to Financial Institution Customer Accounts
**SPONSOR(S):** Rommel
**TIED BILLS:** HB 585 **IDEN./SIM. BILLS:**

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|---|---|---|
| 1) Insurance & Banking Subcommittee | | Fletcher | Lloyd |
| 2) Ethics, Elections & Open Government Subcommittee | | | |
| 3) Commerce Committee | | | |

## SUMMARY ANALYSIS

The federal Bank Secrecy Act (BSA) establishes reporting, recordkeeping, and related requirements for federal and state-chartered financial institutions to help detect and prevent money laundering. Under the BSA, financial institutions are required to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities. These types of reports are known as "suspicious activity reports" (SARs) and are filed with the Financial Crimes Enforcement Network, a bureau of the U.S. Department of the Treasury.

Florida's codification of the BSA is the Florida Control of Money-Laundering and Terrorist Financing in Financial Institutions Act (Act). The Act requires financial institutions to submit to the Office of Financial Regulation (OFR) certain reports and maintain certain records of customers, accounts, and transactions involving currency or monetary instruments or suspicious activities in accordance with the policies of the BSA.

HB 585, to which this bill is linked, requires financial institutions to file a report with OFR whenever the financial institution suspends, terminates, or takes similar action restricting access to a customer's or member's account, whether due to suspicious activity or otherwise. HB 585 also requires, among other things, OFR to investigate the termination-of-access report to determine whether the financial institution's action was made in bad faith, and report a bad faith determination to the Department of Financial Services, the Attorney General, and the customer or member.

This bill, which is linked to the passage of HB 585, creates a public records exemption for certain information received by OFR in a termination-of-access report, including information received by OFR as part of its investigations or examinations of such reports.

The bill provides that the public records exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2029, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the Florida Constitution.

The bill is effective upon the same date that HB 585 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

**Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.**

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

**Public Records**

The Florida Constitution sets forth the state's public policy regarding access to government records, guaranteeing every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.[1] The Legislature, however, may provide by general law for exemption[2] from public record requirements provided the exemption passes by two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption, and is no broader than necessary to meet its public purpose.[3]

The Florida Statutes also address the public policy regarding access to government records, guaranteeing every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt.[4] Furthermore, the Open Government Sunset Review Act[5] provides that a public record exemption may be created, revised, or maintained only if it serves an identifiable public purpose and the "Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption."[6] An identifiable public purpose is served if the exemption meets one of the following purposes:

- 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; or
- Protect trade or business secrets.[7]

Pursuant to the Open Government Sunset Review Act, a new public record exemption or substantial amendment of an existing public record exemption is repealed on October 2nd of the fifth year following enactment, unless the Legislature reenacts the exemption.[8]

Furthermore, 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. However, 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.[9]

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[1] Art. I, s. 24(a), FLA. CONST.
[2] A public record exemption means a provision of general law which provides that a specified record, or portion thereof, is not subject to the access requirements of s. 119.07(1), F.S., or s. 24, Art. I of the State Constitution. *See* s. 119.011(8), F.S.
[3] Art. I, s. 24(c), FLA. CONST.
[4] *See* s. 119.01, F.S.
[5] S. 119.15, F.S.
[6] S. 119.15(6)(b), F.S.
[7] *Id.*
[8] S. 119.15(3), F.S.
[9] *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); *see* Attorney General Opinion 85-62 (August 1, 1985).

### *Financial Institutions Codes*

Florida's Financial Institutions Codes are codified under Title XXXVIII of the Florida Statutes.[10] The Financial Institutions Codes apply to all state-authorized and state-chartered financial institutions and to the enforcement of all laws relating to state-authorized and state-chartered financial institutions.[11] A primary purpose of the Financial Institutions Codes is to provide for and promote the safe and sound conduct of the financial services industry in Florida.[12]

The specific chapters under the Financial Institutions Codes are:

- Ch. 655, F.S. – Financial Institutions Generally
- Ch. 657, F.S. – Credit Unions
- Ch. 658, F.S. – Banks and Trust Companies;
- Ch. 660, F.S. – Trust Business
- Ch. 662, F.S. – Family Trust Companies
- Ch. 663, F.S. – International Banking
- Ch. 665, F.S. – Associations
- Ch. 667, F.S. – Savings Banks

OFFICE OF FINANCIAL REGULATION

The Office of Financial Regulation (OFR) is the regulatory authority for Florida's financial services industry.[13] OFR reports to the Financial Services Commission (Commission) which is made up of the Governor and the members of the Florida Cabinet: the Chief Financial Officer (CFO), Attorney General (AG), and Agriculture Commissioner.[14] OFR enforces and administers the Financial Institutions Codes; is responsible for supervising banks, credit unions, savings associations, and international bank agencies; and licenses and regulates non-depository finance companies and the securities industry.[15]

BANK SECRECY ACT

The federal Bank Secrecy Act (BSA)[16] establishes reporting, recordkeeping, and related requirements for federal and state-chartered[17] financial institutions to help detect and prevent money laundering.[18] Specifically, the BSA and other anti-money laundering regulations (BSA/AML) require financial institutions to, among other things, keep records of cash purchases of negotiable instruments and file reports of cash transactions exceeding $10,000 (daily aggregate amount).[19]

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[10] S. 655.005(1)(k), F.S.
[11] S. 655.001(1), F.S.
[12] S. 655.001(2), F.S.
[13] Florida Office of Financial Regulation, *About Our Agency*, https://flofr.gov/sitePages/AboutOFR.htm (last visited Dec. 4, 2023).
[14] *Id.*
[15] Florida Department of Financial Services, *Financial Services Commission*, https://www.myfloridacfo.com/about/about-dfs/commission (last visited Dec. 4, 2023). *See also*, s. 655.012, F.S.
[16] 31 U.S.C. § 5311 et seq.
[17] *See*, 12 C.F.R. § 326.8 (sets forth requirements for state-chartered banks to establish and maintain procedures to ensure and monitor their compliance with the BSA). *See also*, 12 C.F.R. § 353 (establishes requirements for state-chartered banks to file a suspicious activity report under certain circumstances).
[18] U.S. Treasury Financial Crimes Enforcement Network, *FinCEN's Legal Authorities*, https://www.fincen.gov/resources/fincens-legal-authorities (last visited Dec. 6, 2023).
[19] *Id.*

Under the BSA/AML laws, financial institutions must also:

- Establish effective BSA compliance programs;
- Establish effective customer due diligence systems and monitoring programs;
- Screen against Office of Foreign Assets Control lists and other government lists;
- Establish an effective suspicious activity monitoring and reporting process; and
- Develop risk-based anti-money laundering programs.[20]

The U.S. Office of the Comptroller of Currency regularly conducts examinations of national banks, federal branches, federal savings associations, and agencies of foreign banks in the U.S. to determine compliance with BSA/AML laws.[21]

*Suspicious Activity Reports*

In addition to the other requirements under the BSA/AML laws, financial institutions are also required to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities.[22] These types of reports are known as "suspicious activity reports" (SAR) and are filed with the Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Department of the Treasury, using FinCEN's BSA E-filing system.[23]

Under this requirement, a financial institution is required to file an SAR no later than 30 calendar days after the date of initial detection of facts that may constitute a basis for filing an SAR.[24] For instances where no suspect was identified on the date of the incident requiring the filing, a financial institution may delay filing an SAR for an additional 30 calendar days to identify a suspect.[25] However, in no case shall reporting be delayed more than 60 calendar days after the date of initial detection of a reportable transaction.[26]

FLORIDA CONTROL OF MONEY-LAUNDERING AND TERRORIST FINANCING IN FINANCIAL INSTITUTIONS ACT

The purpose of the Florida Control of Money-Laundering and Terrorist Financing in Financial Institutions Act[27] (Act), s. 655.50, F.S., is to require submission to OFR of certain reports and the maintenance of certain records of customers, accounts, and transactions involving currency or monetary instruments or suspicious activities if:[28]

- such reports and records deter using financial institutions to conceal, move, or provide proceeds obtained from or intended for criminal or terrorist activities; or
- such reports and records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

The Act requires financial institutions to designate and retain a BSA/AML compliance officer, which is defined as an officer that is responsible for the development and implementation of the financial institution's policies and procedures for complying with the requirements of the Act and BSA/AML laws.[29] Any change in a financial institution's BSA/AML compliance officer must be reported to OFR.[30] Additionally, the Act requires financial institutions to maintain:[31]

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[20] U.S. Office of the Comptroller of the Currency, *Bank Secrecy Act*, https://www.occ.treas.gov/topics/supervision-and-examination/bsa/index-bsa.html (last visited Dec. 5, 2023).
[21] *Id.*
[22] U.S. Treasury Financial Crimes Enforcement Network, *supra* note 17.
[23] U.S. Office of the Comptroller of the Currency, *Suspicious Activity Report Program*, https://www.occ.treas.gov/publications-and-resources/forms/sar-program/index-sar-program.html (last visited Dec. 5, 2023).
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] S. 655.50, F.S.
[28] S. 655.50(2), F.S.
[29] S. 655.50(4), F.S.
[30] *Id.*
[31] S. 655.50(8), F.S.

- full and complete records of all financial transactions, including all records required by the BSA/AML laws, for a minimum of 5 years;
- a copy of all reports filed with OFR as required under the Act for a minimum of 5 years after submission of the report;
- a copy of all records of exemption for each qualified business customer[32] for a minimum of 5 calendar years after termination of exempt status of such customer.

The Act also requires financial institutions to keep a record of each financial transaction which involves currency or other monetary instrument that has a value greater than $10,000, involves the proceeds of specified unlawful activity, or is designed to evade the reporting requirements of the Act or other state or federal laws, or which the financial institution reasonably believes is suspicious activity.[33]

A financial institution, or officer, employee, or agent thereof, which files a report in good faith pursuant to the Act is not liable to any person for loss or damage caused in whole or in part by the making, filing, or governmental use of the report, or any information contained therein.[34]

*OFR Enforcement*

In addition to any other powers conferred by the Financial Institutions Codes, OFR may bring an action in court to enforce or administer the Act, as well as issue and serve upon any person an order of removal if OFR determines such person is violating, has violated, or is about to violate any provisions of the Act or any similar state or federal law.[35]

OFR may also impose and collect an administrative fine against any person found to have violated any provision of the Act or similar state or federal law in an amount up to $10,000 per day for each willful violation or $500 per day for each negligent violation.[36]

*Violations of the Act*

A person who willfully violates the Act commits a misdemeanor of the first degree,[37] unless the violation involves financial transactions of certain amounts, in which case the criminal penalties vary by first, second, and third-degree felonies depending on the amount and timing of such transactions. [38]
In addition to the criminal penalties, a person who violates the Act may be subject to a fine of up to $250,000 or twice the value of the financial transaction, whichever is greater, and a subsequent violation could result in a fine up to $500,000 or quintuple the value of the financial transaction, whichever is greater.[39]

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[32] *See*, 31 U.S.C. § 5313(e), providing that the U.S. Secretary of Treasury (Secretary) may exempt a depository institution from BSA/AML reporting requirements for transactions between the institution and a "qualified business customer" (QBC) of the institution on the basis of information submitted to the Secretary. QBC is defined as a business that:
- maintains a transaction account at the depository institution;
- frequently engages in transactions with the institution which are subject to BSA/AML reporting requirements; and
- meets criteria which the Secretary determines is sufficient to ensure the purposes of the BSA/AML laws are carried out without requiring a report for such transactions.

[33] S. 655.50(5), F.S.
[34] S. 655.50(5)(c), F.S.
[35] Ss. 655.50(9)(a)-(c), F.S.
[36] S. 655.50(9)(d), F.S.
[37] S. 655.50(10)(a), F.S.
[38] S. 655.50(10)(b), F.S. A person who willfully violates or knowingly causes another to violate the Act and the violation involves financial transactions of certain amounts:
- financial transactions totaling or exceeding $300 but less than $20,000 in any 12-month period, commits a felony of the third degree;
- financial transactions totaling or exceeding $20,000 but less than $100,000 in any 12-month period, commits a felony of the second degree; or
- financial transactions totaling or exceeding $100,000 in any 12-month period, commits a felony of the first degree.

[39] S. 655.50(10)(c), F.S.

A person or financial institution who violates the Act may also be liable for a civil penalty of not more than the greater of the value of the financial transaction involved or $25,000.[40]

EFFECTS OF BANKS' TERMINATION OF ACCOUNT ACCESS

In 2022, banks filed over 1.8 million SARs, which is a 50% increase in two years.[41] Multiple SARs often result in a financial institution terminating, suspending, or otherwise restricting a customer's account access.[42] A New York Times study of over 500 cases of financial institutions "dropping" their customers, including interviews with current and former bank industry staffers, revealed the negative effects of a bank's decision to remove a customer's account access:

> Individuals can't pay their bills on time. Banks often take weeks to send them their balances. While the institutions close their credit cards, their credit scores suffer. Upon cancellation, small businesses often struggle to make payroll – and must explain to vendors and partners that they don't have a bank account for the time being… [And] once customers have moved on, they don't know whether there is a black mark somewhere on their permanent records that will cause a repeat episode at another bank. If the bank has filed an SAR, it isn't legally allowed to tell you, and the federal government prosecutes only a small fraction of the people whom the banks document in their SARs.[43]

As a result, customers do not know why they were ever under suspicion.[44] Interviews with individuals who had lost access to their accounts revealed behaviors that may have caused their banks to "drop" them.[45] Specifically, a few of the interviews revealed the following:[46]

- Unusual Cash Deposits: When a bar owner's weekly cash deposits fell just below the federal currency reporting thresholds, the bank closed the bar's account and the personal checking and credit card accounts of the owner and his spouse.
- A Marijuana Connection: A married couple's accounts at a bank were shut down after the husband started receiving direct deposits from a cannabis company that had recently acquired his employer.
- Criminal History: A man who had served 5 years in prison for stealing a car from a dealership and using a counterfeit bill (among other crimes) had his accounts shut down at three different banks. His personal banker from the third bank hinted it was because of his criminal record.

***HB 585***

HB 585, to which this bill is linked, amends Florida's Financial Institutions Codes to require a financial institution that terminates, suspends, or takes similar action restricting a customer's or member's account to file a termination-of-access report with OFR, unless such termination, suspension, or similar action was due to:

- The customer or member initiating the access change themselves;
- A lack of activity in the account; or
- The property is presumed unclaimed pursuant to ch. 717, F.S.[47]

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[40] Ss. 655.50(10)(d)-(e), F.S.
[41] Ron Lieber and Tara Seigel Bernard, *Why Banks Are Suddenly Closing Down Customer Accounts*, Thomson Reuters (Nov. 5, 2023), https://www.nytimes.com/2023/11/05/business/banks-accounts-close-suddenly.html?unlocked_article_code=1.8Uw.udoQ.0cmUgCSuo6eS&smid=nytcore-android-share (last visited Dec. 5, 2023).
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] Ch. 717, F.S. is the Florida Disposition of Unclaimed Property Act (FDUP Act). Unclaimed property is a financial asset that is unknown or lost, or has been left inactive, unclaimed, or abandoned by its owner. Under the FDUP Act, unclaimed property is held by business or government entities (known as "holders") for a set period of time, usually 5 years. If the holder is unable to locate the owner, re-establish contact, and return the asset, it is reported and remitted to the Florida

HB 585 also provides that the termination-of-access report shall be filed at such time and must contain such information as the Commission requires by rule.

OFR INVESTIGATION AND DETERMINATION

Within 90 days after receipt of a termination-of-access report, OFR must investigate the financial institution's action and determine whether the action was taken in bad faith as substantiated by competent and substantial evidence that was known or should have been known to the financial institution at the time of the termination, suspension, or similar action.

Within 30 days after making a bad faith determination, OFR must report to the AG and the CFO such bad faith termination, suspension, or similar action. The report to the AG must describe the findings of the investigation, provide a summary of the evidence, and state whether the financial institution violated the Financial Institutions Codes. Upon sending the report to the AG, OFR must also send a copy of the report to the aggrieved customer or member by certified mail, return receipt requested.

HB 585, among other things, also:

- provides that a financial institution's termination, suspension, or similar action restricting a customer's or member's account access in bad faith (as determined by OFR), or a financial institution's failure to timely file a termination-of-access report altogether, constitutes a violation of Florida's Financial Institutions Codes and subjects the financial institution to the applicable sanctions and penalties provided therein; and
- requires OFR to provide any filed termination-of-access report, and any information contained therein, to any federal, state, or local law enforcement or prosecutorial agency, and any federal or state agency responsible for the regulation or supervision of financial institutions, if the provision of such report is otherwise required by law.

**Effect of the Bill**

This bill, which is linked to the passage of HB 585, creates a public records exemption for certain information received by OFR in a termination-of-access report, including information received by OFR as part of its investigations or examinations of such reports, and provides that such information is confidential and exempt.

The bill contains a statement of public necessity, as required by Article I, Section 24(c) of the Florida Constitution. Specifically, the release of information contained in a termination-of-access report, including information received by OFR in connection with its investigations and examinations of such reports, could injure a financial institution in the marketplace by providing its competitors with detailed insight into its business operations, thereby diminishing the advantage the institution maintains over its competitors that do not possess such information.

Additionally, OFR may receive sensitive financial and personal information of customers or members in filed termination-of-access reports, the release of which could defame or jeopardize the personal and financial of such individuals and their family members. An exemption from public records requirements is necessary to ensure OFR's ability to administer its regulatory duties while preventing unwarranted damage to a financial institution or a customer or member thereof.
The bill provides that the public records exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2029, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the Florida Constitution.

The bill is effective upon the same date that HB 585 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

Department of Financial Services' Division of Unclaimed Property. *See*, Florida Department of Financial Services, Division of Unclaimed Property, *About*, https://fltreasurehunt.gov/UP-Web/sitePages/About.jsp (last visited Dec. 5, 2023).

B. SECTION DIRECTORY:

**Section 1.** Amends s. 655.59, F.S., relating to termination-of-access reports filed by financial institutions; investigations by the Office of Financial Regulation.

**Section 2.** Provides a statement of public necessity.

**Section 3.** Provides a contingent effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have a minimal fiscal impact on agencies because agency staff responsible for complying with public records requests may require training related to the creation of the public record exemption. Agencies could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed by existing resources, as they are part of the day-to-day responsibilities of agencies.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

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:

Vote Requirement
Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record exemption. The bill creates a public record exemption; therefore, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the Florida Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. This bill creates a public record exemption for certain information received by OFR pursuant to a termination-of-access report filed by a financial institution. The purpose of the exemption is to protect sensitive personal, financial, and business information that OFR receives in conjunction with its duties related to receiving a termination-of-access report and investigating and examination such reports. As such, the bill appears to be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

None. The bill does not confer rulemaking authority nor require the promulgation of rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to public records; amending s. 655.49, F.S.; providing a public records exemption for termination-of-access reports filed by financial institutions with the Office of Financial Regulation and for information contained in such reports; providing for future legislative review and repeal of the exemption; providing statements of public necessity; providing a contingent effective date.

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

Section 1. Subsection (4) of section 655.49, Florida Statutes, as created by HB 585, 2024 Regular Session, is amended to read:

655.49 Termination-of-access reports by financial institutions; investigations by the Office of Financial Regulation.—

(4)(a) All reports filed pursuant to this section, and any information contained therein, are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2029, unless reviewed and saved from repeal through reenactment by the Legislature.



CODING: Words stricken are deletions; words underlined are additions.

(b) The office shall provide any report filed pursuant to this section, or information contained therein, to any federal, state, or local law enforcement or prosecutorial agency, and any federal or state agency responsible for the regulation or supervision of financial institutions, if the provision of such report is otherwise required by law.

Section 2. (1) The Legislature finds that it is a public necessity that a termination-of-access report filed with the Office of Financial Regulation pursuant to s. 655.49, Florida Statutes, by a financial institution that terminates, suspends, or takes similar action restricting a customer's or member's account access and any information obtained by the office in the report or as the result of the office's investigation and examination duties under s. 655.49, Florida Statutes, be made confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. The disclosure of such report and information could injure a financial institution in the marketplace by providing its competitors with detailed insight into its business operations, thereby diminishing the advantage that the institution maintains over its competitors that do not possess such information. Proprietary business information derives actual or potential independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons who can derive economic value from its disclosure or use. The Office of

Financial Regulation, in performing its duties and responsibilities, may need to obtain proprietary business information from financial institutions. Without an exemption from public records requirements for proprietary business information provided to the office, such information becomes a public record when received and must be divulged upon request. Release of proprietary business information would give business competitors an unfair advantage and weaken the position in the marketplace of the proprietor that owns or controls the business information.

(2) Furthermore, the office may receive sensitive financial and personal information of customers or members in the termination-of-access reports filed by financial institutions, the release of which could defame or jeopardize the personal and financial safety of such individuals and their family members. Placing within the public domain the financial and personal identifying information of the customers or members of the financial institutions would increase the security risk for these customers or members, who could become the target of criminal activity. An exemption from public records requirements is necessary to ensure the office's ability to administer its regulatory duties while preventing unwarranted damage to a financial institution or a customer or member of a financial institution.

Section 3. This act shall take effect on the same date

that HB 585 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 623 Home Warranty Transfers
**SPONSOR(S):** Steele
**TIED BILLS:** **IDEN./SIM. BILLS:**

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|---|---|---|
| 1) Insurance & Banking Subcommittee | | Herrera | Lloyd |
| 2) Commerce Committee | | | |

## SUMMARY ANALYSIS

A home warranty agreement is a service contract that may be purchased from a home warranty association or from an insurer to protect residential real property. In Florida, home warranty associations are regulated by the Office of Insurance Regulations (OIR) and must maintain certain minimum financial standards to do business. The home warranty agreement often covers home systems and common appliances. A home warranty agreement is tied to the owner selling the home and does not transfer to the person buying the home unless the home seller transfers it to the new owner.

The bill makes residential real property home warranties automatically transfer with the property when it is sold, rather than transferring it only if a separate assignment is made within 15 days of the sale of the residence.

The bill also makes the following changes:

- the home warranty association or the insurer continues to be obligated under the terms of the home warranty agreement for a warranty that is transferred and may not charge a fee for the transfer of the warranty eliminating the $40 assignment fee;
- the transfer of a home warranty does not make the existing warranty term longer;
- the seller of the residential real property, the home warranty association, or the insurer shall deliver a paper or electronic copy of the home warranty to the purchaser within 15 days after the home is sold or transferred.

Also, the bill establishes that it is an unfair method of competition and an unfair or deceptive acts or practice for a home warranty association or insurer to fail to continue to perform obligations under a transferred home warranty agreement.

This bill provides an effective date as of July 1, 2024.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

**Background**

A warranty is an assurance that a manufacturer or seller makes about the condition of its product.[1] A warranty means that a manufacturer or seller will replace or repair the product under certain instances. A warranty can be either express or implied.[2]

An express warranty is a verbal or written assurance for the product.[3] On the other hand, an implied warranty is an unstated assurance that the product is made for its intended purpose.[4] An implied warranty is in addition to an express warranty. However, an implied warranty may be negated or limited by an express warranty. There is no implied warranty if a seller states that the product is "as is", "with all faults", or similar language.[5]

*Home Warranties*

A home warranty is a contract or agreement between the homeowner and the issuing company, safeguarding the homeowner from expenses related to the repair or replacement of structural components or appliances in the home.[6] This protection extends to issues caused by normal wear and tear or defects in these components or appliances.[7]

Home warranty contracts or agreements can be drafted by a Home Warranty Association licensed under s. 634.303, F.S., or by an authorized insurance company permitted to offer coverage in this category.[8]

*Magnuson-Moss Warranty Act*

The Magnuson-Moss Warranty Act (MMWA)[9] is a federal law that governs consumer product warranties. Passed in 1975, the Act requires manufacturers and sellers of consumer products to provide consumers with detailed information about warranty coverage before and after the sale of the warranted product.[10]

The MMWA defines three kinds of consumers:

- a buyer of any consumer product;
- any person to whom such product is transferred during the duration of an implied or express warranty applicable to the product;
- any other person who is entitled by the terms of such warranty or under applicable State law to enforce the obligations of the warranty.[11]

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[1] S. 681.102(22), F.S.
[2] 45 Fla. Jur 2d Sales and Exchanges of Goods § 156.
[3] "An express warranty is created by an affirmation of fact or promise made by the seller to the buyer that relates to the goods, by any description of the goods that is made part of the basis of the bargain, or by any sample or model that is made part of the basis of the bargain." S. 672.313, F.S.
[4] S. 672.314, F.S.
[5] S. 672.316, F.S.
[6] S. 634.301(2), F.S.
[7] *Id*.
[8] S. 634.303, F.S.
[9] 15 U.S.C. §§ 2301-2312 (1975).
[10] MMWA does not apply if a seller or manufacturer does not provide a warranty on their product. Jason Gordon, *Magnuson Moss Warranty Act – Explained*, The Business Professor, Sept. 26, 2021, https://thebusinessprofessor.com/en_US/consumer-law/magnuson-moss-warranty-act (last visited Dec 4, 2023).
[11] *O'Connor v. BMW of N. Am., LLC*, 905 So. 2d 235, 236–37 (Fla. 2d DCA 2005); *see also*, § 2310(d) of MMMWA provides that, "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title, or under a written warranty, implied warranty, or service contract, may bring suit for damages…"

## Home Warranties – Current Situation

The elective market in Florida allows a builder, seller, buyer, or owner of a home to choose whether they would like to purchase a home warranty to cover against the cost of repair or replacement, or furnishes repair or replacement, of any structural component or appliance of a home, caused by wear and tear or a defect of a structural component or appliance.[12]

Warranty associations and companies in Florida, including those associations selling home and service warranties, and those companies selling motor vehicle service agreements, are regulated by the Office of Insurance Regulation (OIR).[13] OIR regulates the insurance industry in Florida. OIR is responsible for the regulation of all activities in the state concerning insurers and other risk bearing entities, including licensing, rates, policy forms, market conduct, claims, issuance of certificates of authority, solvency, viatical settlements, premium financing, and administrative supervision.[14]

While warranties are not considered traditional insurance products, OIR regulates warranty associations and companies similarly to the way in which it regulates insurers.[15] Home and service warranty associations must be licensed by OIR[16] and must maintain certain minimum financial standards in order to do warranty business in Florida.[17]

The following chart reflects the number of licensed warranty associations in Florida as of December 6, 2023:[18]

| Type of Association/Company | Number of Licensees |
|---|---|
| Home Warranty Association | 46 |
| Service Warranty Association | 101 |
| Motor Vehicle Warranty Company | 119 |
| **Total** | **266** |

Home warranty providers must ensure that every home warranty is sent or delivered to the warranty holder within 45 days after the commencement of coverage, subject to the insurer's or home warranty association's premium payment requirements.[19] Furthermore, all home warranty contracts are transferable.[20] The contract should explicitly inform the purchaser of their right to assign it within 15 days of selling or transferring the home. The home warranty company may charge an assignment fee not exceeding $40.[21] The home warranty may be assigned, as well from a home builder, who initially purchased the warranty, to subsequent home purchasers.[22]

## Effect of the Bill

[12] S. 634.301(2), F.S.
[13] *See* ch. 634, F.S.
[14] Florida Office of Insurance Regulation, *Organization and Operation,* https://floir.com/about-us/organization-and-operation#:~:text=The%20Florida%20Office%20of%20Insurance,settlements%2C%20premium%20financing%2C%20and%20administrative *(last visited Dec. 7, 2023). See also s. 624.308, F.S., and R. 69O, et seq., F.A.C.*]
[15] *See* ch. 634, F.S.
[16] Ss. 634.303 and 634.403, F.S. Neither the Florida Insurance Code nor this section grants permission for any home warranty association to conduct insurance business beyond what is specifically defined as home warranty or to participate in any other form of insurance. Any engagement in alternative insurance types requires explicit authorization through a certificate of authority issued by the office under the provisions of the Florida Insurance Code. S. 634.325, F.S.
[17] Ss. 634.3077 and 634.406, F.S.
[18] Data retrieved from OIR Active Company Search application, https://floir.com/CompanySearch/index.aspx (last visited Dec. 6, 2023).
[19] S. 634.312(2), F.S.
[20] S. 634.312(1), F.S.
[21] *Id*.
[22] *Id*. Certain exemptions in the home warranty association statute cover cases where builders or appliance sellers offer standard guarantees without extra charges, exclude service contracts with non-profits handling repairs, and accept contracts aligning with Florida's Insurance Code for systems and appliances, excluding structural components. Individuals affiliated with a domestic insurer are exempt if they avoid offering home warranties to Florida residents, but compliance requires the insurer to directly issue warranties or provide a specific policy. Non-compliance, as determined by the Office of Insurance Regulation, subjects the person to home warranty association regulations. Additionally, the regulations do not apply to programs offering warranties on new homes if supported by an insurance policy from a licensed Florida insurer, contingent on approval by the Office. S. 634.301(2), F.S.

The bill makes residential real property home warranties automatically transfer with the property when it is sold, rather than transferring it only if a separate assignment is made within 15 days of the sale of the residence.

The bill also makes the following changes:

- the home warranty association or the insurer continues to be obligated under the terms of the home warranty agreement for a warranty that is transferred and may not charge a fee for the transfer of the warranty eliminating the $40 assignment fee;
- the transfer of a home warranty does not make the existing warranty term longer;
- the seller of the residential real property, the home warranty association, or the insurer shall deliver a paper or electronic copy of the home warranty to the purchaser within 15 days after the home is sold or transferred.

Finally, the bill establishes that it is an unfair method of competition and an unfair or deceptive acts or practice for a home warranty association or insurer to fail to continue to perform obligations under a transferred home warranty agreement.

This bill provides an effective date as of July 1, 2024.

B. SECTION DIRECTORY:

**Section 1:** Amends s. 634.312, F.S., relating to forms; required provisions and procedures.

**Section 2:** Amends s. 634.327, F.S., relating to applicability to warranty on new home.

**Section 3**: Amends s. 634.331, F.S., relating to coverage of property for sale.

**Section 4:** Creates 634.336, F.S., relating to unfair methods of competition and unfair or deceptive acts or practices defined.

**Section 5:** Provides an effective date of July 1, 2024.

## 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:

There may be a positive economic impact for property owners and subsequent owners as they can benefit from the remaining home warranty coverage for their residential real property without needing additional paperwork due to the currently required separate assignment agreement. The home purchaser could bear lower out of pocket costs if there is covered damage or wear and tear.

Home warranty associations and insurers may experience nominal increased costs due to the bill's prohibition on assignment fees.

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 counties or municipalities governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None provided by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 3 of the bill was amended to fix a technical redundancy in the statute, which restates a definition of a term already defined in s. 634.301(8), F.S., i.e., the term "listing period" already includes the date the sale is closed.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to home warranty transfers; amending s. 634.312, F.S.; providing requirements for home warranties transferred to subsequent home purchasers; amending ss. 634.327 and 634.331, F.S.; conforming provisions to changes made by the act; making technical changes; amending s. 634.336, F.S.; revising the definition of the term "unfair methods of competition and unfair or deceptive acts or practices" to include failure to continue to perform obligations under home warranties transferred to subsequent home purchasers; providing an effective date.

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

Section 1. Subsections (2) through (6) of section 634.312, Florida Statutes, are renumbered as subsections (6) through (10), respectively, and subsection (1) of that section is amended to read:

634.312 Transfers; forms; required provisions and procedures.—

(1) If a residential real property covered by a home warranty is conveyed to a new owner, the home warranty in force on that residential real property:

(a) Is automatically transferred to the new owner; and



CODING: Words stricken are deletions; words underlined are additions.

(b) Continues in effect as if the new owner was the original purchaser of the home warranty.

(2) The home warranty association or the insurer that issued the home warranty shall continue to be obligated under the terms of the home warranty for a home warranty transferred to a subsequent home purchaser under this subsection.

(3) The transfer of the home warranty to a subsequent home purchaser under this subsection does not extend the remaining term of the home warranty.

(4) The seller of the residential real property, the home warranty association, or the insurer, as applicable, shall deliver a paper or electronic copy of the home warranty to the subsequent home purchaser within 15 days after the home is sold or transferred ~~All home warranty contracts are assignable in a consumer transaction and must contain a statement informing the purchaser of the home warranty of her or his right to assign it, at least within 15 days from the date the home is sold or transferred, to a subsequent retail purchaser of the home covered by the home warranty and all conditions on such right of transfer. The home warranty company may charge an assignment fee not to exceed $40~~.

(5) Home warranty transfers under this section ~~assignments~~ include, but are not limited to, the transfer of a home warranty ~~assignment~~ from a home builder who purchased the home warranty to a subsequent home purchaser.

Section 2. Section 634.327, Florida Statutes, is amended to read:

634.327 Applicability to warranty on new home.—Except as provided in s. 634.312(1), this part does ~~shall~~ not apply to any program offering a warranty on a new home which is underwritten by an insurer licensed to do business in the state when the insurance policy underwriting such program has been filed with and approved by the office as required by law.

Section 3. Section 634.331, Florida Statutes, is amended to read:

634.331 Coverage of property for sale.—A home warranty may provide coverage of residential property during the listing period of such property for a period not to exceed 12 months, provided that the home warranty company charges the warranty purchaser a separately identifiable charge for the listing period coverage in an amount equal to at least 15 percent of the annual premium charged for the home warranty and the charge for such coverage is due at the ~~earlier of the~~ end of the listing period ~~or the date the sale of the residential property is closed~~. The requirements in s. 634.312(1) apply to the home warranty that is transferred to the home purchaser.

Section 4. Subsections (6) through (9) of section 634.336, Florida Statutes, are renumbered as subsections (7) through (10), respectively, and a new subsection (6) is added to that section to read:

634.336 Unfair methods of competition and unfair or deceptive acts or practices defined.—The following methods, acts, or practices are defined as unfair methods of competition and unfair or deceptive acts or practices:

(6) FAILURE TO CONTINUE TO PERFORM OBLIGATIONS UNDER TRANSFERRED HOME WARRANTIES.—Failing to continue to perform obligations under the terms of a home warranty transferred to a subsequent home purchaser as required in s. 634.312(1).

Section 5. This act shall take effect July 1, 2024.

**INSURANCE & BANKING SUBCOMMITTEE**

**HB 623 by Rep. Steele**
**Insurance**

**AMENDMENT SUMMARY**
**December 13, 2023**

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**Amendment 1 by Rep. Steele (strike all):** The amendment:

- Clarifies that, if a home warranty covers structural components, it must automatically transfer to the new homeowner upon the sale of the home.
    - Structural components include things such as the roof, plumbing system, electrical system, foundation, basement, exterior/interior walls, ceilings, floors, stucco, or spray foam.
- Applies the automatic transfer requirement to express written warranties issued by the home builder or purchased by the builder from home warranty association.
- Provides that the transfer of a warranty does not modify or extend the warranty's commencement date or its duration, nor is the scope of coverage expanded due to the transfer.
- Specifies that the builder transacting insurance when providing a compliant warranty to a home buyer.

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 | _____ |

Committee/Subcommittee hearing bill: Insurance & Banking Subcommittee

Representative Steele offered the following:

**Amendment (with title amendment)**

Remove everything after the enacting clause and insert:

Section 1. Subsection (1) of section 634.312, Florida Statutes, is amended to read:

634.312 Forms; required provisions and procedures.—

(1) Except as provided in section 634.601: ~~all~~

(a) Home warranty contracts are assignable in a consumer transaction and must contain a statement informing the purchaser of the home warranty of her or his right to assign it, at least within 15 days from the date the home is sold or transferred, to a subsequent retail purchaser of the home covered by the home warranty and all conditions on such right of transfer.

(b) The home warranty company may charge an assignment fee not to exceed $40.

(c) Home warranty assignments include, but are not limited to, the assignment from a home builder who purchased the home warranty to a subsequent home purchaser.

Section 2. Section 634.331, Florida Statutes, is amended to read:

634.331 Coverage of property for sale.—A home warranty may provide coverage of residential property during the listing period of such property for a period not to exceed 12 months, provided that the home warranty company charges the warranty purchaser a separately identifiable charge for the listing period coverage in an amount equal to at least 15 percent of the annual premium charged for the home warranty and the charge for such coverage is due at the ~~earlier of the~~ end of the listing period ~~or the date the sale of the residential property is closed~~. The requirements in s. 634.601 apply to a home warranty that is transferred to the home purchaser.

Section 3. Part IV of chapter 634, Florida Statutes, consisting of ss. 634.600-634.602, Florida Statutes, is created to read:

PART IV

Miscellaneous Provisions

634.600 Definitions. – As used in this part, the term:

(1) "Builder" means the primary contractor of a home who

possesses the requisite skill, knowledge, and experience, and has the responsibility, to supervise, direct, manage, and control the contracting activities of the business organization with which she or he is connected and who has the responsibility to supervise, direct, manage, and control the construction work on a job for which she or he has obtained the building permit. Construction work includes, but is not limited to, construction of structural components.

(2) "Home warranty" or "warranty" has the same meaning as in s. 634.301.

(3) "Home warranty association" has the same meaning as in s. 634.301.

(4) "Indemnify" means to undertake repair or replacement of a home's structural component or pay compensation for such repair or replacement by cash, check, or other similar means, including, but not limited to, electronic means.

(5) "Structural components" means one or more structural component of a home including, but not limited to, the roof, plumbing system, electrical system, foundation, basement, exterior or interior walls, ceilings, floors, or spray foam. "Exterior walls" includes, but is not limited to, any siding, stucco, or paint on the exterior walls.

634.601 Structural Component Indemnification or Coverage.—

(1) If a builder is obligated on and provides a homebuyer an express written warranty that indemnifies a homebuyer against

the cost of repairing the structural components of a home, then the express written warranty and all indemnification rights thereunder shall automatically transfer to any subsequent purchaser(s) of the home during the duration of the express written warranty.

(2) If a builder purchases a home warranty from a licensed home warranty association covering the structural components of a home then the home warranty and all indemnification rights thereunder shall automatically transfer to any subsequent purchaser(s) prior to the end of the home warranty term.

(3) Nothing in this section shall modify or extend the commencement date or the duration, or expand the scope of coverage, of the express written warranty or home warranty, as applicable, beyond the express written warranty's or home warranty’s terms.

(4) This section does not:

(a) Require a builder that is obligated on and providing a homebuyer an express written warranty to obtain a license under the Florida Insurance Code and such practice shall not constitute the transaction of insurance subject to the requirements of the Code, unless otherwise required by law.

(b) Permit the provision of indemnification against consequential damages arising from the failure of any structural component, which practice constitutes the transaction of insurance subject to all requirements of the Florida Insurance

Code.

634.602 Unfair method of competition and unfair or deceptive act or practice defined.—It is an unfair method of competition and unfair or deceptive act or practice to fail to continue to perform obligations under the terms of an express written warranty or a home warranty transferred to a subsequent home purchaser as required in s. 634.601.

Section 4. Chapter 634, Florida Statutes, entitled "Warranty Associations," is renamed "Warranties and Warranty Associations."

Section 5. This act shall take effect July 1, 2024.

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

Remove lines 3-12 and insert:

s. 634.312, F.S.; limiting application; amending s. 634.331, F.S.; conforming provisions to changes made by the act; making technical changes; creating a new part IV of chapter 634, F.S., entitled "Miscellaneous Provisions"; creating s. 634.600, F.S., providing definitions; creating s. 634.601, F.S., providing requirements for express written warranties and home warranties transferred to subsequent home purchasers; creating s. 634.602, F.S.; defining an unfair method of competition and unfair or deceptive act or practice; creating an undirected section of law renaming Chapter 634, F.S.,; providing an effective date.