

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB GVOPS 15-05 OGSR Office of Financial Regulation Exam Techniques and Procedures

**SPONSOR(S):** Government Operations Subcommittee

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 7010

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Government Operations Subcommittee		Williamson	Williamson

### SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The Florida Securities and Investor Protection Act (act) governs the regulation of securities transactions in Florida. The Office of Financial Regulation (office) is designated as the regulator to enforce the act. The office may make investigations and examinations within or outside of Florida, as it deems necessary, to determine whether a person has violated or is about to violate any provision of the act or a rule or order under the act, or to aid in the enforcement of the act.

Current law provides a public record exemption for information that would reveal examination techniques or procedures used by the office pursuant to the act. The office may provide the confidential and exempt information to another governmental entity having oversight or regulatory or law enforcement authority.

The bill reenacts the public record exemption, which will repeal on October 2, 2015, if this bill does not become law.

The bill does not appear to have a fiscal impact on state or local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Open Government Sunset Review Act

The Open Government Sunset Review Act<sup>1</sup> (Act) sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

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

If, and only if, in reenacting an exemption that will repeal and the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.<sup>2</sup> If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created<sup>3</sup> then a public necessity statement and a two-thirds vote for passage are not required.

##### Florida Securities and Investor Protection Act<sup>4</sup>

The Florida Securities and Investor Protection Act (act) governs the regulation of securities transactions in Florida. The Office of Financial Regulation (office) is designated as the regulator to enforce the act.

The office receives and acts upon applications to have securities registered. Applications must be duly signed by the applicant, sworn to by any person having knowledge of the facts, and filed with the office.<sup>5</sup> An application may be made by the issuer<sup>6</sup> of the securities or by any registered dealer desiring to sell the securities within Florida.<sup>7</sup> The office may require the applicant to submit certain information concerning the issuer in order to enable the office to ascertain whether the securities must be registered.<sup>8</sup>

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> Section 24(c), Art. I of the State Constitution.

<sup>3</sup> An example of an exception to a public record exemption would be allowing another agency access to confidential and exempt records.

<sup>4</sup> Codified as chapter 517, F.S.

<sup>5</sup> Section 517.081(2), F.S.

<sup>6</sup> Section 517.021(14), F.S., defines the term "issuer" to mean any person who proposes to issue, has issued, or must issue any security. Any person who acts as a promoter for and on behalf of a corporation, trust, or unincorporated association or partnership of any kind to be formed must be deemed an issuer.

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

<sup>8</sup> *See* s. 517.081(3), F.S.

The office may make investigations and examinations within or outside of Florida, as it deems necessary:

- To determine whether a person has violated or is about to violate any provision of the act or a rule or order under the act; or
- To aid in the enforcement of the act.<sup>9</sup>

#### Public Record Exemption under Review

In 2010, the Legislature created a public record exemption, with retroactive application,<sup>10</sup> for information that would reveal examination techniques or procedures used by the office pursuant to the act.<sup>11</sup> The office may provide the confidential and exempt<sup>12</sup> information to another governmental entity having oversight or regulatory or law enforcement authority.<sup>13</sup>

The term “examination techniques and procedures” is defined to mean the methods, processes, and guidelines used to evaluate regulatory compliance and to collect and analyze data, records, and testimony for the purpose of documenting violations of the act and the rules promulgated thereunder.<sup>14</sup>

Section 2 of chapter 2010-65, L.O.F., which is the public necessity statement for the exemption, provides that:

(2) Examinations are an essential component of securities regulation. The mere existence of an examination program fosters regulatory compliance and deters fraud and abuse by industry participants. Examinations often detect violations in their early states. This early detection allows corrective action to be taken before significant harm can be done to investors. Due to the importance of such examinations, state regulators devote extensive resources to devising effective examination techniques and procedures.

The public necessity statement further provides that allowing access to information revealing examination techniques and procedures “would undermine the examination process and facilitate evasion of the law.”<sup>15</sup> In addition, the effective and efficient administration of the examination program would be significantly impaired without the public record exemption, as would the office’s ability to uncover misconduct and evaluate policies and procedures through the examination process.<sup>16</sup> Finally, the public necessity statement provides that without the public record exemption, the office’s ability to participate in joint examinations with other securities regulators would be impaired since the office would be unable to accept or use confidential examination techniques and procedures developed by other regulators.<sup>17</sup>

Pursuant to the Open Government Sunset Review Act, the public record exemption will repeal on October 2, 2015, unless reenacted by the Legislature.<sup>18</sup>

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<sup>9</sup> Section 517.201(1)(a), F.S.

<sup>10</sup> In 2001, the Florida Supreme Court ruled that a public record exemption does not apply retroactively unless the legislation clearly expresses such intent. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d 373 (Fla. 2001).

<sup>11</sup> Chapter 2010-65, L.O.F.; codified as s. 517.2016(2), F.S.

<sup>12</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See Attorney General Opinion 85-62 (August 1, 1985).

<sup>13</sup> Section 517.2016(3), F.S.

<sup>14</sup> Section 517.2016(1), F.S.

<sup>15</sup> Subsection (3), s. 2, chapter 2010-65, L.O.F.

<sup>16</sup> Subsections (1) and (3), s. 2, chapter 2010-65, L.O.F.

<sup>17</sup> Subsection (4), s. 2, chapter 2010-65, L.O.F.

<sup>18</sup> Section 517.2016(4), F.S.

During the 2014 interim, subcommittee staff reviewed information provided by the office as part of the Open Government Sunset Review process.<sup>19</sup> The office indicated that:

Maintaining the confidentiality of examination techniques and procedures is essential for protecting the integrity of the examination programs that states use to regulate the securities industry. If these important investigative tools are made available to the public through open records requests or other means, some members of the securities industry will undoubtedly use them to thwart effective examinations, cover up illegal conduct, and circumvent the law.<sup>20</sup>

### **Effect of the Bill**

The bill removes the repeal date, thereby reenacting the public record exemption for information that would reveal examination techniques or procedures used by the Office of Financial Regulation under the Florida Securities and Investor Protection Act. It also makes editorial changes.

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

Section 1 amends s. 517.2016, F.S., to save from repeal the public record exemption for information that would reveal examination techniques or procedures used by the Office of Financial Regulation.

Section 2 provides an effective date of October 1, 2015.

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

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

1. Revenues:

None.

2. Expenditures:

None.

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

1. Revenues:

None.

2. Expenditures:

None.

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

None.

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

None.

## **III. COMMENTS**

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

1. Applicability of Municipality/County Mandates Provision:

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<sup>19</sup> Information is on file with the Government Operations Subcommittee.

<sup>20</sup> Email from staff for OFR sent on August 29, 2014 (on file with the Government Operations Subcommittee).

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

Not applicable.